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NOMINATION

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

CLARENCE THOMAS, OF MISSOURI, TO BE CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

JULY 23, 1986

Printed for the use of the Committee on Labor and Human Resources

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NOMINATION

WEDNESDAY, JULY 23, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Kennedy, Wallop, Grassley, Thurmond, Metzenbaum, and Simon.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. We are happy to welcome everybody to the committee this morning.

We are meeting here this morning to consider the nomination of Clarence Thomas for reappointment as Chairman of the Equal Employment Opportunity Commission.

Mr. Thomas, you are no stranger to this body, and we have a lot of respect for you. I think your record at the commission is very well known to this committee as well. In my opinion, you have done an incredible job as Chairman, and I am personally grateful to have been able to work with you. You have been so willing to work with the committee as problems come up. And of course I look forward to working with you for another term as well.

In July 1981, this committee became very aware of critical management and financial problems at the EEOC which, in our opinion, required immediate correction. I asked the GAO to conduct an audit of the agency as quickly as possible. Three months later, in October 1981, the GAO provided the committee with an interim report that found the Commission at that time to be in financial chaos. Its books could not be audited; reports were unreliable; accounts were mismanaged; fund controls were inadequate, and transactions were unrecorded. It was a mess.

In fact, there were over $27 million in unliquidated obligations, over $9 million in error transactions, and over $1 million in outstanding travel advances which had not been collected from staff.

In June 1982, the GAO released its final report. That report again documented the financial problems confronting the Commission; it raised serious questions about the integrity of past management, and documented possible violations of the law.

For example, the audit revealed that the EEOC managers were certifying annual reports which they knew were inaccurate; and the Commission had given $1.2 million to private attorneys to sub-

sidize the filing of lawsuits at a time when its own General Counsel's Office had run out of funds.

It is amazing to me that there was not a fuss made about all this, other than by this committee, at the time. At the same time, other reports found that the average Commission attorney was handling only three cases a year. Suits were being unnecessarily delayed. The Commission's backlog had grown to 12,000 cases. And complaints were often being settled without any regard for the merits of the case. One can only wonder how many cases could have been handled if the Commission was not being operated in such a fashion, really, in such total confusion.

So in sum, the EEOC that you, Clarence Thomas, inherited when you were confirmed in 1982 was a pure and simple disaster.

I did give you copies of all the GAO reports and asked you to do whatever you could to make improvements. And I just want to say as chairman of this committee that I think your efforts have exceeded all expectations. And I want to personally compliment you, because I have not seen anybody do a better job of cleaning up the mess that really existed in the Commission at that particular time.

In 1984, for the first time in its history, the EEOC received full approval of its financial accounting system by the GAO. The $1.2 million in outstanding travel advances was eliminated through a tough debt collection system. And, as one would expect, enforcement activities have increased under your leadership.

In the 3 years since you became Chairman, the EEOC has obtained through litigation and compliance efforts $419.9 million in monetary benefits for victims of discrimination—more than in any other 3-year period of the Commission. In fiscal year 1985, the Commission won $54.2 million in relief through litigation—more than in any other preceding year in the Commission's history.

The number of cases going to litigation has also increased. The 411 court actions filed in fiscal year 1985 is the second highest total for a single year. Of the suits that were filed, over half were class actions. Moreover, the Commission has handled more charges during your stewardship than in any other comparable period.

Again, I want to compliment you for that.

Clarence Thomas has in my opinion been an excellent Chairman of EEOC at a time when the Commission desperately needed courage, integrity, and leadership. You have served without applause, without self-indulgent fanfare. You have even been attacked by some for agreeing to be part of the Reagan administration.

But the simple fact is that the EEOC today is doing a much better job of combating employment discrimination than it was back in 1982. The difference, in my opinion, has been Clarence Thomas, yourself.

It is my hope that when the committee next meets in executive session on July 30, that we will favorably report your nomination to be Chairman of the EEOC again.

You have been and will continue, I believe, to be an effective, courageous, and productive Chairman, and I think you deserve our expeditious review of your nomination.

I apologize for having postponed your hearing from last week, but a couple of our Senators just could not be there, and I wanted to accommodate them because they do have some questions; and

they pretty well agreed that if we held this hearing today that we will then have the markup or at least report you out.

[At this point we will receive Senator Grassley's statement for the record.]

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, a little over 200 years ago the Founding Fathers made a Declaration of Independence from Great Britain. In that declaration, they affirmed their belief that the Creator has created all men equal and endowed them with certain unalienable rights, that among these rights are life, liberty, and the pursuit of happiness.

It seems to me that in the two centuries that have passed since the Declaration of Independence was penned by Thomas Jefferson, that clear affirmation has been both our main inspiration and our main challenge as a nation.

The challenge is how we, as a nation, will put into practice the principle that men are created equal and endowed with unalienable rights, and that the fundamental duty of Government is to protect those rights.

Today, we are considering a very important nomination indeed. The Equal Employment Opportunity Commission is charged with eliminating discrimination based on race, color, religion, sex, national origin, or age from the workplace.

The EEOC is thus charged with protecting our most fundamental American value, the right of all Americans to have an equal opportunity under the law to better himself or herself and make a contribution to our society.

I have noted that Chairman Thomas, in his tenure at EEOC, has made a strong commitment to enforcing the various laws that prohibit discrimination in the workplace. It is the duty of this committee in these hearings to examine Mr. Thomas' record in order to determine if he has conscientiously and diligently carried out his mandate as Commissioner.

The CHAIRMAN. With that, we will turn to Senator Kennedy, the ranking member of the committee.

I might first say that Senator Danforth called and regrets that due to a reconciliation markup, he will not be able to be here as he was 4 years ago to speak in support of you. Senator Danforth hired you as you graduated from law school in the attorney general's office in the State of Missouri. He brought you to the Senate as a legislative assistant when he was elected in 1976. If he were here, he tells me he would tell us that he thinks Clarence Thomas is a first-rate individual, a man of great capability, great integrity, and great commitment to the cause of racial justice. So he commends you to the committee, and I think that is high praise coming from Senator Danforth.

We will turn to Senator Kennedy at this time.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to acknowledge your willingness to adjust these hearings to accommodate the interest of the membership. All of us are grateful for this. The position of the nominee is of very significant

importance and consequence, and this hearing will provide us with an opportunity to examine the record.

I am not familiar with any time agreement for the committee's consideration of the nominee, although I do not believe that I know of any reason why there should be delay. Since there was some reference to a time agreement, I want to at least express my understanding of the situation.

Mr. Chairman, in 1972 the Congress recognized that the equal employment laws of the Civil Rights Act were not being enforced. We granted the Equal Employment Opportunity Commission significant new powers to enforce title VII of the act. The Commission also has responsibility to enforce the Equal Pay Act and the Age Discrimination in Employment Act.

Yet now, 14 years later, there is disturbing evidence that the laws have been made a dying or dead letter again; disturbing evidence that policies in effect for more than a decade on affirmative relief in cases of proven or admitted discrimination have been abandoned. And they were abandoned by orders given without notifying the Congress.

The Commission has changed the standards of proof in hiring cases, with the result that the most effective civil rights remedy in the Federal arsenal has been dulled and set aside; and again, the change was made in the dark rather than in the sunshine as the law requires.

The rights of older workers to their pensions has been ignored because of pressure from the Office of Management and Budget, even though the Equal Employment Opportunity Commission has twice voted to change the law and end the discrimination against older workers and their pension rights.

The evidence goes on. Chairman Hawkins' House Labor Committee has reported on mismanagement in the Agency, including not only secret changes in major policies, but also manipulation of enforcement reports to give the illusion that the law has been carried out.

This nomination hearing could not be more timely. The Supreme Court has flatly rejected the administration's argument that affirmative action to remedy past discrimination is unconstitutional or illegal. The House report has raised serious questions about policy and management at the Agency. And this committee has just voted to reject the administration's nominee to the office of general counsel of the EEOC.

Few agencies in Government so embody our deepest hopes and most shared principles as does the Equal Employment Opportunity Commission. Congress has a responsibility under the laws and the Constitution to see to it that the Commission has the leadership and resources it requires to discharge its duties. And I am certain that Mr. Thomas is aware of the criticism of the EEOC, and I am sure that he shares our interest in setting the record straight.

The CHAIRMAN. Thank you, Senator Kennedy.

Senator Wallop.

Senator WALLOP. Thank you, Mr. Chairman.

I welcome the opportunity to welcome Mr. Thomas this morning.

Our committee has an opportunity today to demonstrate that we can consider a qualified Presidential nomination in a reasonable and dispassionate manner.

Lately, it seems that this committee has been ganging up on the President's executive nomination. If the President, no matter what his party or political persuasion, nominates a qualified individual to serve in his administration, the President deserves the courtesy of Senate approval.

Mr. Thomas, by his performance and by his dedication to the concept of equality, deserves the Senate's approval. As we now consider Clarence Thomas for a second 4-year term as Chairman of the Equal Employment Opportunity Commission, we find that not only is he well-qualified but also, in my opinion, very brave to once again go through what has become a brutal, degrading nomination process.

According to his liberal critics, Mr. Thomas is guilty of not coming to the EEOC with a political agenda. This was a sharp departure from the practices of his predecessors who, too often, were intent on legislating through regulations rather than providing a proper administration of existing statutes.

It is certainly no secret that during the seventies, the EEOC was in total chaos and was on the verge of ceasing to function as an effective mechanism for resolving discrimination complaints. The major reason was the increased politicization of the EEOC.

Now, fortunately for us all, Mr. Thomas has devoted his first 4 years at the EEOC to imposing better management on its operation. The EEOC has focused on better turnaround on the job discrimination complaints. The Commission is hearing more cases than ever before and has decreased its backlog, which was a major problem of the seventies.

It should also be noted that the Commission has been largely spared from budget cuts. The budget in President Carter's last year was $125 million; the 1985 operating budget was $164 million.

Chairman Hatch's opening statement reviewed the improved efficiency of the EEOC, so I will not repeat this most impressive record. I have attached a table to my statement which reviews the diligent enforcement activities of the Commission.

But it is frustrating to face a situation where a dedicated public servant is efficiently and effectively implementing a law, yet is subject to a barrage of criticism because he is not administering the law as it is interpreted by some special interests.

For instance, the statutes guiding the EEOC say nothing about quotas to remedy discrimination complaints. But critics believe that quotas are the only remedy for resolving employment discrimination suits.

Mr. Thomas has read the law and has correctly decided that goals and timetables are the proper remedy.

Clarence Thomas should be congratulated by this panel for his administrative accomplishments and his dedication to carrying out the law.

Senator Danforth, for whom Clarence Thomas worked both in Missouri and in Washington, best described him as follows: "He is a person of very high character, very fine judgment, has a fine mind, and is a person who is totally committed to the cause of im-

proving employment opportunity for all the people of this country." I urge the committee to reaffirm Mr. Thomas as Chairman of the EEOC as quickly as possible.

Thank you, Mr. Chairman.

[The table referred to follows:]

Enforcement Activities of the U.S. Equal Employment Opportunity Commission

Fiscal Year	76 [1] 7/1/75-9/30/76	77 10/1/76-9/30/77	78 10/1/77-9/30/78	79 [2] 10/1/78-9/30/79	80 [3] 10/1/79-9/30/80	81 10/1/80-9/30/81	82 10/1/81-9/30/82	83 10/1/82-9/30/83	84 10/1/83-9/30/84	85 10/1/ 9/30/
Court Actions Lawsuits and Interventions	484	241	188	208 [4]	358	444	241	195	310	411
Class Actions Percentage of Suits Filed [5]	N/A	N/A	N/A	N/A	N/A	N/A	42%	55%	51%	54%
(Number of Subpoena Enforcement Actions & Others Included)	(N/A)	(N/A)	(12)	(16) [4]	(32)	(76)	(77)	(59)	(88)	(125)
Monetary Relief Thru Litigation	$5.5 million	$10 million	$34 [6] million	$9 million	$20.9 million	$16.2 million	$33.5 million	$40.3 million	$38.8 million	$54.2 millio
Monetary Relief Thru Compliance	N/A	$18.2 million	N/A	$23.8 million	$57.3 million	$91.7 million	$101.2 million	$104.5 million	$107.1 [7] million	$75.0 millio
Total Monetary Benefits	N/A	$28.2 million	N/A	$32.8 million	$78.2 million	$107.9 million	$134.7 million	$144.8 million	$145.9 million	$129.2 millio
Charges Received In Process	53,613	57,562	37,390	35,279	41,042	53,700	50,935	66,461	63,232	67,12
Case Closures	N/A	48,922	52,715	39,915	49,353	71,690	67,052	74,441	55,034	63,56
Administration	Ford	Ford to 1/77	Carter	Carter	Carter	Carter to 1/81	Reagan	Reagan	Reagan	Reaga
		Carter from 1/77				Reagan from 1/81				
Chairman	Lowell Perry 5/75-5/76	Walsh (V.Chair)	Norton	Norton	Norton	Norton to 2/81	Smith to 3/82	Thomas	Thomas	Thom
	Ethel Walsh (V.Chair) 3/75-8/77	E.H. Norton 6/77-2/81				J. Clay Smith 3/81-1/82	Cathie A. Shattuck 3/82-5/82			
							Clarence Thomas from 5/82			
Budget Authority (Millions)	$82,349 [8]	$70,513	$84,550	$111,417	$124,562	$144,610	$144,739	$147,421	$154,039	$163.
Authorized Positions	2,584	2,487	2,837	3,752	3,779	3,790	3,326	3,084 [9]	3,125 [9]	3,125
Average Employment	2,189	2,470	2,409	3,243	3,390	3,058 [10]	3,084	3,084	3,044	3,097

Notes

1/ FY76 was 15 months long due to change in fiscal period.
2/ ADEA and EPA litigation authority began 7/1/79.
3/ FY80 was first full year EEOC had jurisdiction of ADEA and EPA.
4/ Does not include ADEA and EPA.
5/ Complete data on type of cases filed was not maintained until FY82.
6/ GE case $29.4 million.
7/ GM case $42.5 million.
8/ Includes 3-month transition $18,690,000.
9/ Full-Time Equivalency (FTE).
10/ Includes 433 new hires Oct. 1980 through Jan. 1981.

Appendix A

The CHAIRMAN. Thank you, Senator Wallop.

We will turn to Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, as I sit here, I cannot help but think of the time many years ago when I fought for the enactment of Fair Employment Practices Commission legislation in the Ohio General Assembly. It was a tremendous battle, and finally we won it, after a period of something like 10 years. We went back to the legislature year after year after year.

And then I remember when there was the appointment of the chairman, and the chairman was up for confirmation and, almost without exception, every civil rights leader in the State was anxious to come forward to testify in his behalf.

To me it is rather significant, and I would think to the nominee himself it would be particularly significant, that we are conducting a hearing today in connection with his renomination, and to the best of my knowledge, nobody—nobody—in the American civil rights community will be here urging the confirmation of the nominee.

That gives a message loud and clear to the entire Nation. And I would think it would have a strong message to the nominee himself. I think it would say to him: What is there about me that causes the civil rights community not to be here, supporting my nomination? Does the whole army march to a different drumbeat than that which I play?

And, if that be so, how can I comport with myself my designation as the Chairman of the Equal Employment Opportunity Commission?

I would think that the nominee would have some real concerns about that.

It is wonderful to have my distinguished chairman speak so eloquently about your administrative achievements, and my colleague from Wyoming speak to how well you have been doing—and I respect them for that, and I commend you for their support. But I believe that there is a very loud and clear message that has to be found in the failure of the civil rights community to come forth to support this nomination.

Having said that, Mr. Chairman, you had indicated your desire to move this matter forward promptly, and I have no quarrel with doing that. On the other hand, I do want to know the answers to the questions that are asked routinely in our questionnaire. One of those has to do with contributions to political candidates. Our nominee said that he made nominal contributions to several candidates, cannot remember the names of the candidates or the amounts contributed.

Before this matter goes to an executive session for action, I would hope and expect you to direct the nominee to go back and search his records. Normally, political contributions are made by check; the check stubs are available, canceled checks are available. I believe the committee is entitled to have that information so we may determine for ourselves whether they are nominal, and also that we may be advised as to who received those contributions. So I want to say to the Chairman that I would ask you to direct the nominee to search his records for that purpose.

The CHAIRMAN. Do you have any problem with that, Mr. Thomas?

Mr. THOMAS. I do not have any problem. The contributions, if any, were to such events as receptions held in honor of candidates, and they were very nominal, probably in the order of $10 to $20, and they were cash.

The CHAIRMAN. So you just do not have any——

Mr. THOMAS. I do not have the funds to make major contributions.

The CHAIRMAN. Would you do this for us. If you have any checks that you can find——

Mr. THOMAS. I do not have any; I mean, it is as simple as that. I do not make contributions to political candidates, as a matter of practice. I do not have the funds to do it.

The CHAIRMAN. I think that is a good explanation, but we will of course allow Senator Metzenbaum to ask specific questions about it, and whether they were Republicans—I presume, maybe you did support some Republicans. You never know.

Senator METZENBAUM. That is not illegal or even unethical yet.

Senator WALLOP. It is not even unwise. [Laughter.]

Senator METZENBAUM. It might be bad judgment, but it is not illegal.

The CHAIRMAN. All right.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

There is no question, based on what the chairman said and what Senator Wallop said, that you have done a good job on the administrative side. And frankly, Senator Danforth has spoken to me about you and has spoken very highly.

I think the question is do you really believe in the mission of the agency, and that is what I want to sense. I think, with all due respect to my good friend from Wyoming, when he says, "If competent, we owe the President the courtesy of approval," that is a different standard than the advise and consent understanding of those who wrote our Constitution.

I think we have to ask for more than competency. I think we have to ask for belief in the job that you are doing. And I do not know that my colleague from Wyoming would differ on that.

And here when, for example, my colleague mentioned goals and timetables, I have your testimony before the House Education and Labor Subcommittee in which you say, "I do not support the use of goals and timetables. I do not think as a practical matter that they work."

There are some things in the record that do disturb me, and I hope during the course of this hearing that we can have a chance to get that out on the table and have a good discussion not only of your nomination, but of what the real function of your agency is.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Let us turn to you, Mr. Thomas, if you have any statement you would care to make. Just summarize; I do not think you need to take much time.

Go ahead, please.

STATEMENT OF CLARENCE THOMAS, NOMINATED FOR REAPPOINTMENT AS CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. THOMAS. First, Mr. Chairman, I would like to thank you for having the hearings in an expeditious manner, and I would like to read my prepared remarks. But before that, I would like to make a couple of observations about the comments.

I perhaps wisely or unwisely made the decision to seek renomination for some very personal reasons. I agree with Senator Wallop that the process has been somewhat grueling for those who come before this committee and other committees. But I find some of the criticism that have been leveled absolutely amazing over the past 4 years, and in some instances, actually to contradict themselves.

I find also amazing the talk about commitment. Senator Metzenbaum mentioned his efforts in the Ohio Legislature. Well, all I have to offer is the fact that I grew up under segregation. I attended school under segregation, and I was the only black in my high school for 2 years of high school. And I am not used to walking in step with anybody because I was the only one of my kind, normally, wherever I was.

I also find it amazing that the amorphous concept of commitment is equated with agreement with those who claim commitment. I happen to be committed to what we are talking about. I have said it again and again and again. I have seen statements ripped out of context. I have seen statements distorted about statistics and other matters, for example.

I think it would be absolutely incongruous to work long hours, to upgrade and make an agency that I think is important work, to now take the position that I do not believe in what it I am doing. It is the height of absurdity for me to wake up and go to work to do a job—which is indeed a thankless job, and the only feedback that we normally get is criticism—if I did not believe in what I was doing.

With that, I would like to take the opportunity to introduce three of my Commissioners who joined me. The fourth unfortunately could not be here after the hearing date was changed. Commissioner Tony Gallegos; Commissioner Ricky Silberman; and Commissioner William Webb.

The CHAIRMAN. We welcome you, Commissioners, and appreciate having you with us.

Mr. THOMAS. And I again have the distinct pleasure to appear before this committee to seek your confirmation of my renomination as Chairman of the Equal Employment Opportunity Commission.

I am pleased to be here primarily because I believe in the mission of EEOC and bcause I now know we have become an effective agency in enforcing the laws under our jurisdiction.

Four years ago, I was not that confident. GAO had found, as the Chairman pointed out, serious problems in the administration and management of the Agency, and of course this committee had found similar problems. Simultaneously, there was considerable debate over and interest in a number of employment issues which involved EEOC as an Agency and me in my capacity as Chairman.

I made the conscious choice at that time to concentrate my energies on strengthening the management of the Agency, to make the Agency effective. Although we still have quite a way to go, we are now headed in the right direction—a positive, constructive direction.

Problematic areas such as financial management have been greatly improved, and the deficiencies highlighted by GAO have been successfully addressed. We are now locking in and institutionalizing management controls so that the deficiencies do not recur. We are also preparing the Commission to enter the 21st century with an integrated management structure and service delivery system that can effectively enforce the laws under our jurisdiction.

At my first confirmation hearing, Mr. Chairman, I stated that, "Essentially, the Commission is an enforcement Agency and should function as such." Over the past 4 years, we have consciously and deliberately transformed EEOC into an enforcement Agency. I use the word "we" because the Commissioners have unanimously and unequivocally supported this philosophy by adopting a remedies policy and an enforcement policy. The Commission unanimously adopted the remedies policy which in essence says that to the greatest extent possible, we are going to immediately place the charging party in the position he or she would have been but for discrimination and that we want the discriminatory conduct ended and remedied now—no promissory notes.

The essence of our enforcement policy is that we will enforce our administrative findings of discrimination.

But as the members of this committee know, tough talk is cheap, and implementation is tough—very tough. The initial efforts to develop the capacity to implement our policies have been very positive. But so much remains to be done. Tough but fair enforcement must become the hallmark of EEOC or it has absolutely no reason to exist.

The Commissioners have successfully garnered and focused the positive energies of the Agency toward such enforcement. But we still must enhance our ability to properly characterize cases at the earliest possible stage of our administrative process. We must improve on the quality and timeliness of our investigations. We must enhance the credibility and quality of our litigation efforts. We must continue to develop a systemic program that focuses on discernible patterns and practices of discrimination and effectively eliminate them from the workplace. We must continue in our efforts to automate EEOC and build centralized data systems with integrity. Perhaps most important, we must continue to upgrade our personnel and our resources.

This must do list is a major reason for my seeking to remain as Chairman of EEOC. I have felt, since my confirmation in the spring of 1982, that continuity and consistency at the top of the Agency were critical if there was to be progress.

I am the eighth Chairman of a Commission that is only 21 years old, and I have served 4 of those years, the second-longest tenure. At the top, EEOC's history has been a saga of discontinuity.

I believe in the mission of this Agency, and I believe that continuity at the top is an indispensable ingredient in carrying it out.

But there are several personal reasons. This committee and the committee staffers have made our efforts less difficult. Mr. Chairman, you and your staff members have never waivered in your support of the Commission, even when others did waiver. This was particularly true in those instances when we had no place else to turn for assistance.

The group of Commissioners we currently have at EEOC are in my opinion unsurpassed in their support for the whole concept of equal employment opportunity and their collegial attitude, which encourages both vigorous debate and respect for each other. Not only is it a joy to work with them, but also to know that together, we can accomplish so much.

I also have a great deal of respect for the many employees at the EEOC who worked to support our efforts to build an effective Agency and enforcement policy.

Even more personal, however, I was raised by two people, my grandparents, who taught me that individual freedoms are essential to our way of life and that these fragile but important freedoms must be protected. One of the most basic roles of Government is to protect its citizens not only from those beyond our borders, but from each other. Unless that is effectively done, those who are the least liked, the least tolerated and the most vulnerable will not have a prayer, and will be subjected to the whims of the majority—as those of us raised under segregation so well remember.

We who believe in free enterprise have an obligation to see to it that we are not just paying lip service to empty platitudes—that those who have been discriminatorily excluded in the past are now included. Just saying that everyone has an opportunity does not make it so.

This Commission has charted a positive course and has built the momentum to make the Equal Employment Opportunity Commission an effective force in making the freedoms and opportunities of this country a reality for all. If confirmed, I intend to maintain that course.

I will respond to whatever questions you have.

[The biographical sketch of Mr. Thomas with attachments follows:]

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: THOMAS (LAST) Clarence (FIRST) NMN (OTHER)

Position to which nominated: Chairman, Equal Employment Opportunity Commission Date of nomination:

Date of birth: 23 (DAY) June (MONTH) 1948 (YEAR) Place of birth: Savannah, Georgia

Marital status: Divorced Full name of spouse: N/A

Name and ages of children: Jamal Adeen Thomas - 13

Education:

Institution	Dates attended	Degrees received	Dates of degrees
St. Pius X High School	1962-1964	None	
St. John Vianney Seminary	1964-1967	High Sch Diploma	
Immaculate Conception Seminary	1967-1968	None	
Holy Cross College	1968-1971	AB	June 4, 1971
Yale Law School	9/71-5/74	JD	May, 1974

NOTE: St. Pius X High School and St. John Vianney Minor Seminary are no longer in existence.

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Alpha Sigma Nu

National Jesuit Honor Society

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Coordinating Cmte, National Capital Area, CFC	Chairman	Summer, 1982 to present
Board of Trustees, Holy Cross College	Trustee	9/78 - 5/86

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

5/82 - Present - Chairman, Equal Employment Opportunity Commission, Washington, D.C.

5/81 - 5/82 - Assistant Secretary for Civil Rights, U.S. Department of Education, Wash., D.C.

8/79 - 5/81 - Legislative Assistant to Senator John C. Danforth, Washington, D.C.

1/77 - 8/79 - Attorney for the Monsanto Company, St. Louis, Missouri

6/74 - 1/77 - Attorney General of Missouri, Asst. Attorney General, Jefferson City, Missouri

6/73 - 8/73 - Summer intern for Hill, Jones, & Farrington Savannah, Georgia (partially funded by a grant from the Law Students Civil Rights Research Council - $60.00 per week) Firm is no longer in existence.

9/72-- 6/73 - Legal Intern for Community Action Research Project(CARP), New Haven, CT. - during 2nd year of law school, (can't remember exact date

6/71 - 5/74 - Legal intern for New Haven Legal Assistance New Haven, Connecticut

Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

NONE

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

SEE ATTACHED

Political affiliations and activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

Republican

Made several political speeches (e.g., Milwaukee, Wis., Savannah, Ga. etc.)

Made nominal contributions to several candidates. (can't remember names of candidates or amounts contributed)

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

N/A

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

NONE

3. Has a commitment been made to you for employment after you leave Federal service?

NO

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Until next Presidential election or several months prior to it.

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

NONE

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

NONE

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

NONE

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

NONE

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

N/A

Articles By Clarence Thomas

The Equal Employment Opportunity Commission: Reflections on a New Philosophy.
Stetson Law Review Volume XV, Number 1
Labor and Employment law Symposium
Tampa, FL

Abandon the rules; they cause injustice
USA Today
Arlington, VA
September 5, 1985

No one is speaking for the American blacks
Register
New Haven, CT
November 18, 1985

Pluralism Lives: Blacks Don't All Think Alike
The Los Angeles Times
Los Angeles, CA
November 15, 1985

Pluralism Lives: Blacks Don't All Think Alike
New Pittsburgh Courier
Pittsburgh, PA
November 30, 1985

Pluralism Lives
New Iowa Bystander
Des Moines, IA
November 29, 1985

Blacks Don't All Think Alike
Times
Miami, FL
December 5, 1985

Black society has right to express its pluralism
Milwaukee Sentinel
Milwaukee, Wisconsin
November 19, 1985

Definition of 'the black view'
Call
Allentown, PA
November 18, 1985

CLARENCE THOMAS

An opposing view

Abandon the rules; they cause injustice

WASHINGTON — In the 1960s, this country committed itself to end systematic discrimination against blacks.

The Civil Rights Act of 1964 prohibited employers from discriminating on the basis of race, color, sex, religion, or national origin. Unfortunately, this commitment to non-discrimination soon gave way to a system of group preferences.

The government encouraged and required employers to institute the very practices that sponsors of the civil rights law had observed "are themselves discriminatory." Equally ironic is the willing acceptance of these practices by corporate executives who, if *personally* affected by them, would undoubtedly object.

The alternative to these group preferences is strict enforcement of the law by the Equal Employment Opportunity Commission. In the past, victims of discrimination were often ignored by the EEOC as it instead encouraged employers to adopt "goals and timetables." Now, for the first time, the commission is committed to seek relief for every victim of discrimination.

Some argue group preferences are beneficial, despite their conflict with the law.

They ignore both the substantial black economic progress before quotas and the evidence that hiring and promotion preferences have benefited the most-advantaged members of the preferred groups — people who would have succeeded just through application of the non-discrimination requirement of the 1964 law — while causing the least-advantaged members of those groups to fall farther behind.

Moreover, the notion that blacks must be given preferences in order to succeed and should not be judged by the same standards as other people is founded upon the racist assumption that blacks are inherently inferior. No matter what the benefits might be, conceding this assumption is far too great a price to pay.

Employment preferences will disguise but not change the fact that poor children often attend schools where they will not learn; nor decrease the disastrously high birth rate among black teen-agers, which commits mothers and children to lifetime poverty and despair; nor reduce the crime and other pathological behavior that strangles the neighborhoods where many poor people live.

As Labor Secretary Bill Brock has observed, this country "will have to have some form of affirmative action for the foreseeable future." But if we confuse affirmative action with quotas, "goals and timetables," or other types of group preferences, we will fail to address the real issues and condemn the most disadvantaged individuals in our midst to an even bleaker future.

Clarence Thomas is chairman of the Equal Employment Opportunity Commission.

8A • THURSDAY, SEPTEMBER 5, 1985 • USA TODAY

USA TODAY

"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."
—Allen H. Neuharth
Chairman and Founder
Sept. 15, 1982

Thomas

Los Angeles Times

Friday, November 15, 1985/Part II

Pluralism Lives: Blacks *Don't* All Think Alike

By CLARENCE THOMAS

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John E. Jacobs, president of the National Urban League, in a recent column concluded that ". . . this new poll sinks under the weight of ideological bias and probable methodological errors." Jefferson Morley, in the New Republic, asserted that "the . . . poll is shoddy, disingenuous and slightly ugly." And, as usual, the media stand ready to fan the flames of disagreement.

Whether Linda Lichter, co-director of the nonpartisan, privately funded research group and conductor of the poll, is disavowed or her medium successfully discredited is really of no moment. Lichter's report merely confirms what we already knew: Blacks are no less pluralistic than the rest of society. Just as no one really speaks for white America, no one really speaks for black America. I am certain that many views are shared, but no one, except some politicians who must stand for election or reelection, takes a poll or conducts a referendum before reaching a point of view on a particular issue. I cannot imagine a person saying, "I must see what the view of black America is on this issue before I determine my own opinion."

The argument that the views of the black leadership are consonant with those of black Americans misses the point, since most blacks are not represented by black politicians. Nor are most blacks members of organizations that *claim* to represent them. Heads of such organizations as the National Urban League represent only the members of their respective organizations. Even those actually represented by this leadership may not agree on all or even most matters.

The real issue here, however, is not who represents black America or whether Lichter's survey is right or wrong. Rather, the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from the collective hodgepodge of ideas that we supposedly share because we are members of the same race. There seems to be an obsession with painting blacks as an unthinking group of automatons, with a common set of views, opinions and ideas. Anyone who dares suggest that this may not be the case or has a viewpoint that disagrees with the "black viewpoint" is immediately cast as attacking the black leadership or as some kind of anti-black renegade.

By insisting on one point of view, this new orthodoxy stifles serious debate and the possibility of any meaningful discussion of the countless problems facing blacks today. The cost of having a new or different idea is simply too high. The dissenter from the common view becomes a pariah, and cannon fodder for cute phrases by silver-tongued orators. Differing views are bent and twisted to become the words that we all love to hate. Dissenters are pilloried and used for target practice in the media. If the dissenters dare raise a hand to defend themselves, they are admonished for attacking the sacred "leadership."

Many of us accept the ostracism and public mockery in order to have our own ideas, which are not intended to coincide with anyone else's although they may well do just that. The popularity of our views is unimportant; hence, polls and referendums are not needed to sustain or ratify them. Perhaps the most amazing irony is that those who claim to have the *progressive* ideas have very regressive ones about individual freedoms and the attendant freedom to have and express ideas different from theirs.

We certainly cannot claim to have progressed much in this country as long as it is insisted that our intellects are controlled entirely by our pigmentation, with its countless variations, even though our individual experiences are entirely different. The real value in Lichter's survey is that it demonstrates, notwithstanding protestations to the contrary and pressure to conform to some common black thought, that black Americans continue to have their own opinions.

Beyond the distortions, outright lies and constant harangues against dissenters, black Americans clearly reject the demeaning and racially derogatory notion that we must all think alike. Lichter's survey is not an indictment of black leaders as her critics assert, but an affirmation of the pluralism of black Americans in spite of the intense pressure to conform or, more accurately, not to differ.

Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission.

Thomas
NEW HAVEN, CT
REGISTER
D. 89,750 S. 130,800

NOV 18 1985
BURRELLE'S

No one is speaking for the American blacks

By Clarence Thomas

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Thomas

NOV 30 1985

BURRELLE'S

Perspective

Pluralism Lives: Blacks Don't All Think Alike

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By CLARENCE THOMAS

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Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission. Reprinted by permission of the Los Angeles Times.

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NOV 29 1985
BURRELLE'S

Pluralism Lives

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Reprinted courtesy of the Los Angeles Times.

MIAMI, FL
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DEC 5 1985
BURRELLE'S

Blacks Don't All Think Alike

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Clarence Thomas is Chairman of the U.S. Equal Employment Opportunity Commission. The above article was reprinted from the Los Angeles Times.

MILWAUKEE SENTINEL
MILWAUKEE, WISC.
D. 163,630
Thomas
NOV 19 1985
BUSINESS

Black society has right to express its pluralism

By Clarence Thomas
Los Angeles Times special 639199

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Pluralism Lives: Blacks *Don't* All Think Alike

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LOS ANGELES, CA
Largest Circulation in the West
D. 1,046,985 SUN. 1,298,487
SAT. 967,440

Thomas

NOV 15 1985

By CLARENCE THOMAS 6297yy

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The argument that the views of the black leadership are consonant with those of black Americans misses the point, since most blacks are not represented by black politicians. Nor are most blacks members of organizations that claim to represent them. Heads of such organizations as the National Urban League represent only the members of their respective organizations. Even those actually represented by this leadership may not agree on all or even most matters.

The real issue here, however, is not who represents black America or whether Lichter's survey is right or wrong. Rather, the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from the collective hodgepodge of ideas that we supposedly share because we are members of the same race. There seems to be an obsession with painting blacks as an unthinking group of automatons, with a common set of views, opinions and ideas. Anyone who dares suggest that this may not be the case or has a viewpoint that disagrees with the "black viewpoint" is immediately cast as attacking the black leadership or as some kind of anti-black renegade.

By insisting on one point or view, this new orthodoxy stifles serious debate and the possibility of any meaningful discussion of the countless problems facing blacks today. The cost of having a new or different idea is simply too high. The dissenter from the common view becomes a pariah, and cannon fodder for cute phrases by silver-tongued orators. Differing views are bent and twisted to become the words that we all love to hate. Dissenters are pilloried and used for target practice in the media. If the dissenters dare raise a hand to defend themselves, they are admonished for attacking the sacred "leadership."

Many of us accept the ostracism and public mockery in order to have our own ideas, which are not intended to coincide with anyone else's although they may well do just that. The popularity of our views is unimportant; hence, polls and referendums are not needed to sustain or ratify them. Perhaps the most amazing irony is that those who claim to have the *progressive* ideas have very regressive ones about individual freedoms and the attendant freedom to have and express ideas different from theirs.

We certainly cannot claim to have progressed much in this country as long as it is insisted that our intellects are controlled entirely by our pigmentation, with its countless variations, even though our individual experiences are entirely different. The real value in Lichter's survey is that it demonstrates, notwithstanding protestations to the contrary and pressure to conform to some common black thought, that black Americans continue to have their own opinions.

Beyond the distortions, outright lies and constant harangues against dissenters, black Americans clearly reject the demeaning and racially derogatory notion that we must all think alike. Lichter's survey is not an indictment of black leaders as her critics assert, but an affirmation of the pluralism of black Americans in spite of the intense pressure to conform or, more accurately, not to differ.

Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission.

Definition of 'the black view'

By CLARENCE THOMAS

A recent survey by the Center for Media and Public Affairs "revealed a surprising divergence between black leaders and the average black American on a broad spectrum of concerns, including some at the very heart of race relations." This conclusion and the survey itself have been attacked as both unscientific and faulty.

John E. Jacobs, president of the National Urban League, in a recent column concluded that "... this new poll sinks under the weight of ideological bias and probable methodological errors." Jefferson Morley, in the New Republic, asserted that "the ... poll is shoddy, disingenuous and slightly ugly." And, as usual, the media stand ready to fan the flames of disagreement.

Whether Linda Lichter, co-director of the nonpartisan, privately funded research group and conductor of the poll, is disavowed or her medium successfully discredited is really of no moment. Lichter's report merely confirms what we already knew: Blacks are no less pluralistic than the rest of society. Just as no one really speaks for white America, no one really speaks for black America. I am certain that many views are shared, but no one, except some politicians who must stand for election or re-election, takes a poll or conducts a referendum before reaching a point of view on a particular issue. I cannot imagine a person saying, "I must see what the view of black America is on this issue before I determine my own opinion."

The argument that the views of the black leadership are consonant with those of black Americans misses the point, since most blacks are not represented by black politicians. Nor are most blacks members of organizations that claim to represent them. Heads of such organizations as the National Urban League represent only the members of their respective organizations. Even those actually represented by this leadership may not agree on all or even most matters.

The real issue here, however, is not who represents black America or whether Lichter's survey is right or wrong. Rather, the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from [illegible] hodgepodge of ideas that we supposedly share because we are members of the same race. There seems to be an obsession with painting blacks as an unthinking group of automatons, with a common set of views, opinions and ideas. Anyone who dares suggest that this may not be the case or has a viewpoint that disagrees with the "black viewpoint" is immediately cast as attacking the black leadership or as some kind of anti-black renegade.

By insisting on one point of view, this new orthodoxy stifles serious debate and the possibility of any meaningful discussion of the countless problems facing blacks today. The cost of having a new or different idea is simply too high. The dissenter from the common view becomes a pariah, and cannon fodder for cute phrases by silver-tongued orators. Differing views are bent and twisted to become the words that we all love to hate. Dissenters are pilloried and used for target practice in the media. If the dissenters dare raise a hand to defend themselves, they are admonished for attacking the sacred "leadership."

Many of us accept the ostracism and public mockery in order to have our own ideas, which are not intended to coincide with anyone else's although they may well do just that. The popularity of our views is unimportant; hence, polls and referendums are not needed to sustain or ratify them. Perhaps the most amazing irony is that those who claim to have the progressive ideas have very regressive ones about individual freedoms and the attendant freedom to have and express ideas different from theirs.

"Lichter's report merely confirms what we already knew: Blacks are no less pluralistic than the rest of society. Just as no one really speaks for white America, no one really speaks for black America. I am certain that many views are shared, but no one, except some politicians who must stand for election or re-election, takes a poll or conducts a referendum before reaching a point of view on a particular issue."

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▲

Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission.

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The CHAIRMAN. Well, thank you so much. I am going to reserve my questions at this time and will turn to Senator Kennedy.

Before I do, however, let me just put two statements into the record. I forgot to put these into the record immediately following the statements of Senators. There is a position statement in support of the renomination of the Honorable Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission, by the International Association of Official Human Rights Agencies; and a statement by Representative Barney Frank.

We will put those into the record at this point.

[The statements referred to above follow:]

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Nonprofit Corporation

POSITION STATEMENT

in support of

THE RE-NOMINATION OF

HON. CLARENCE THOMAS

as

CHAIRMAN

of the

U.S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respectfully submitted by:

Anthea M. Boarman
Executive Director
International Association of Official
Human Rights Agencies

MAY IT PLEASE THE COMMITTEE:

On behalf of President James E. Clyburn, and the members of the International Association of Official Human Rights Agencies, I welcome this opportunity to support the re-nomination of Hon. Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission.

The International Association (I.A.O.H.R.A.) is a professional association of 180 Human Rights and Human Relations Commissions in the United States and Canada. Approximately eighty I.A.O.H.R.A. member agencies contract with the U.S. Equal Employment Opportunity Commission (E.E.O.C.). These State and local human rights commissions resolve approximately 50% of the national caseload of employment discrimination charges filed with the E.E.O.C., or dual-filed by the contract agencies.

The Board of Directors and member agencies of I.A.O.H.R.A. at their Annual Meeting held July 5-11, 1986, unanimously endorsed the re-nomination of Chairman Thomas, for three significant reasons. First, the consistency and stability brought by Chairman Thomas in his four years' tenure are essential to formulation of responsible Equal Opportunity policy in a time of social and economic flux. Second, the State and local human rights commissions strongly endorse Mr. Thomas' view that strong law enforcement policies and excellence of case resolution are essential to maintenance of re[illegible]ible administration of E.E.O. laws. Third, the litigation posture of E.E.O.C. under

Mr. Thomas' direction will assure development of a body of case law on individual discrimination, to undergird precedent based on statistical evidence alone.

Chairman Thomas has led the Equal Employment Opportunity Commission longer than any other Chair, with the sole exception of Hon. William H. Brown (1969-1973). E.E.O.C. changed direction and focus many times in the ten-year period during which there were eleven Chairmen, and the consistency and maturity of judgement which Chairman Thomas brings is essential for those who make and enforce policy regarding the enforcement of anti-discrimination laws throughout the country. State and local Commissions, with policy-making authority of their own, look to the federal E.E.O.C. for guidance based upon its collective experience. During the past four years, E.E.O.C. has issued clear, distinct policies on various topics of concern in the administration of anti-discrimination law enforcement, to the benefit of the State and local contract agencies. I.A.O.H.R.A. endorses the consistency of leadership demonstrated in Chairman Thomas' term of office.

The State and local Human Rights Commissions, in keeping with the views of their governing authorities and under established enabling authority and legal precedent, endorse three specific and important directions undertaken by E.E.O.C. under Chairman Thomas' direction: strong emphasis on law enforcement, excellence in case management and charge processing/compliance, and

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determination of the merits of complaints. Additionally, E.E.O.C.'s emphasis on not only traditional race discrimination charges, but also developing areas such as age discrimination and sex harassment has resulted in consequent judicial and administrative guidance for the State and local law enforcement efforts. I.A.O.H.R.A. supports Chairman Thomas' programs and policies in these areas.

Finally, under its current leadership, E.E.O.C. has initiated more litigation on individual charges of discrimination than in any previous administration. The case law in the field of Equal Employment Opportunity developed at a time when statistical evidence standing alone supported charges that minorities were denied opportunities equal to those of their majority counterparts. With the changes in law regarding sex and age discrimination, and the development of neutral employment "systems" (which may have adverse impact on workforces and applicants for employment), practice in this field has become increasingly sophisticated. Discrimination is as invidious, but more subtle in its forms in 1986 than in 1964. Thus, the time for judicial development of individual cases has come. I.A.O.H.R.A. supports Chairman Thomas' direction of litigation of individual charges of discrimination.

For these three major reasons: the stability of Chairman Thomas' term and the need for consistent, mature judgement in development of E.E.O.C. policy; the similarity of views among all

civil rights law enforcement agencies regarding the need for excellence of case resolution techniques and results, determination on the merits of charges, and the need for emphasis on developing areas such as age and sex discrimination as well as traditional race discrimination; and the new litigation presence of E.E.O.C., I.A.O.H.R.A. strongly endorses the re-appointment of Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission.

STATEMENT OF

REP. BARNEY FRANK

CHAIRMAN, HOUSE GOVERNMENT OPERATIONS COMMITTEE

EMPLOYMENT AND HOUSING SUBCOMMITTEE

BEFORE THE

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

Women, minorities, the elderly and Federal employees deserve protection through vigorous enforcement of our civil rights laws and regulations. One key to such enforcement should be the chairman of the Equal Employment Opportunities Commission, but Clarence Thomas has failed to provide critically needed leadership. He should not be rewarded with another term in this sensitive position.

In 1984 and 1985 the Subcommittee on Employment and Housing, which I chair, held hearings on EEOC enforcement of the Title VII prohibition of sex-based wage discrimination, an area of critical importance to women workers. In 1981 the Supreme Court had decided in the Gunther case that claims of such discrimination may be brought even where the jobs are not the same. It is distressing that to this day the EEOC has not pursued this avenue to combat the discrimination which contributes to women's earning only 3/5ths as much as men. In fact, although Mr. Thomas had described another key case as "pure

Gunther", he responded to a Subcommittee inquiry about Gunther -type EEOC cases by saying that the Commission did not understand our request. In four years of Mr. Thomas' chairmanship the EEOC has not brought a single sex-based wage discrimination case based on the Gunther precedent.

The enforcement of equal employment opportunity requirements for Federal employees is another area of great concern to the Employment and Housing Subcommittee. We receive a constant flow of individual reports of endless delays in investigating and deciding charges of discrimination. The EEOC statistics bear out the stories of inexcusable delays at both the agency level and at the Commission. Mr. Thomas has testified repeatedly about his wish for a centralized system to handle all Federal discrimination complaints at EEOC, but it was only after the Subcommittee called a recent hearing that there was any evidence of an effort to obtain the resources and amended regulations to implement such a reform. Many thousands of Federal employees continue to suffer under a system which lacks all credibility. The Federal government is far from a model "equal opportunity employer".

- END -

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Mr. Thomas, in 1971, the Supreme Court held unanimously that a plaintiff makes a prima facie case of discrimination in the employment practices if the plaintiff establishes, through the statistical evidence, that a hiring test had an adverse impact on the plaintiff and the group of which he is a member; is that correct?

Mr. THOMAS. I think you are referring to the *Griggs* decision?

Senator KENNEDY. That is correct.

Mr. THOMAS. Yes; I think so.

Senator KENNEDY. The Court specifically noted that it was not necessary to show the defendant intended to exclude a particular group with the test; it is enough that the test has that effect. Is that correct?

Mr. THOMAS. I think that is generally correct.

Senator KENNEDY. The way that a plaintiff demonstrates that a test has adverse impact is with statistics; is that correct?

Mr. THOMAS. I think—yes, to some extent; not entirely.

Senator KENNEDY. After passage of the Equal Employment Opportunity Act, the Commission enacted the Uniform Guidelines on Employee Selection Procedures. These guidelines state that it is a violation of the guidelines for a selection procedure to have an adverse impact on minorities, unless the test is shown to be job-related. No showing that the employer intended to discriminate has to be made. Is that correct?

Mr. THOMAS. I think that the guidelines do a bit more than that, Senator. The guidelines say that it is discrimination if there is a disparity.

Senator KENNEDY. Suppose, if you have 200 individuals who are applying for a job as ditch-digger—100 blacks, 100 whites—and the city took 80 whites and 20 blacks and said you need a high school education. Based on statistics, would that be prima facie a violation of disparate impact? Would you have any trouble with that?

Mr. THOMAS. Could you just repeat it?

Senator KENNEDY. 200 individuals apply for a ditchdigger job in a community, 100 blacks, 100 whites. The city hires 80 whites and 20 blacks and says you need a high school education to do the job, which obviously is unrelated. As far as you are concerned is that a prima facie case?

Mr. THOMAS. I would have no problems with that case.

Senator KENNEDY. Statistics are the controlling element in those situations, are they not?

Mr. THOMAS. Senator, statistics are part of it——

Senator KENNEDY. Well, what else would you want in an 80-20?

Mr. THOMAS. For example, I could look at the composition up there——

Senator KENNEDY. Let me ask you the question—what else would you want in the fact situation I gave to you?

Mr. THOMAS. In the fact situation you just gave me, I would not want anything else, OK. You do not need a high school diploma to dig a ditch, and that is very simple.

Senator KENNEDY. OK. Now, in a letter last Monday, as I understand, you wrote Representative Hawkins that "Subsequent

changes would not be made to the guidelines in contravention to the principles established in the *Griggs* case"; is that correct?

Mr. THOMAS. That is right.

Senator KENNEDY. All right.

Mr. THOMAS. I think I have stated that on numerous occasions.

Senator KENNEDY. Now, I just want to compare what you have mentioned this morning with some other statements that you have made. As I understand, in the Stetson Law Review in 1985, you wrote that,

> We have unfortunately permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as adverse impact and prima facie cases.

How do you explain this statement in light of your other statements that you support the *Griggs* case and the Uniform Guidelines, which set out the adverse impact doctrine?

Mr. THOMAS. Senator, I think it has been fairly clear in the court cases that more is required than just to show statistical disparities. There are statistical disparities all over the place. There are statistical disparities up there. You just cannot take one set of numbers broadly, compare them to another set of numbers, and always assume that you know the case.

Now, in the case that you gave, it is easier. You have a job, a ditch-digger, that does not require formal education, and you have got a requirement that seems to be clearly pretextual. I do not have a problem with that. But there are many other instances where it is not that clear.

Senator KENNEDY. Well, what were the problems that you found with the Uniform Guidelines? They have been used as the basic test for a number of years, I think with substantial success.

Mr. THOMAS. Well, first of all——

Senator KENNEDY. What is your understanding of the situation that is different from the guidelines?

Mr. THOMAS. Senator, the problem that I have had with the application of any of these approaches is by and large the rigidity. For example, we have instances where the guidelines, as the 80-percent rule—that is that if one group is selected at a rate less than 80 percent of another group—that under the guidelines, that can be discriminatory conduct and require validation.

Well, we have had instances in which the only difference has been one person, and the request from those individuals utilizing the guidelines was for us to find discriminatory conduct for that one person.

You also have, I think, in my opinion, a real problem when you begin to assume that every disparity reveals some kind of discriminatory conduct. The guidelines—the court cases, at least—presumptively, a prima facie case may be made out, but you have an opportunity to then come back and show that there is some reason for it, or to explain why this disparity exists. I think the guidelines tend to be more rigid. They tend to assume that there is discrimination if there is that disparity.

Now, the GAO has called for us to look at the guidelines. I was pressured early in my tenure to look at the guidelines—all of which I resisted. Our initial efforts with respect to the guidelines

were to take a long look at the history of the guidelines, to take a look at all the criticisms of the guidelines. The American Psychological Association has been looking at their standards and have come up with nothing definitive.

So my effort at the Commission has been to take a long studied look at the guidelines in conjunction not only with the testing industry, but also with the available court law. *Griggs* is the seminal case law on that.

Senator KENNEDY. All right. You have written to OMB that you will propose revisions to the Uniform Guidelines.

Mr. THOMAS. I will make proposals of revisions after we have done the studies that I have indicated to you, Senator.

Senator KENNEDY. Well, what are you going to tell us about it today? What types of changes you are going to propose?

Mr. THOMAS. Senator, I have proposed no changes to the guidelines.

Senator KENNEDY. What are you going to tell us? Do you mean after we confirm you, that you will then go ahead and do it? You have now said that you are going to make changes. This is something that is extremely important, yet you will not tell us.

Mr. THOMAS. Senator, I have——

Senator KENNEDY. You have been on the job. Why can't you tell us what you are going to change? This is enormously important.

Mr. THOMAS. The guidelines have not been top priority. The proposed changes in guidelines have not been top priority for me over the past 4 years. I have received pressures from all sources to make changes to the guidelines. It is a matter that I intend to look into, a matter that I intend to make proposals on.

I have, as I have indicated to you, had suggestions that agreed with my own general view of the guidelines, that I have dismissed, because my approach to making policy at the Commission is to go back, to look at all applicable law, to look at the criticisms, to get input from others, and then to make proposals—not to make proposals and then get the input.

Senator KENNEDY. You said back in 1985, in OMB required submission—and I know you are pressed, but this is over a year ago—"I shall propose to the Commission and to the consignatory agency a revision of the new GST that will recognize statistical disparities are not tantamount to discrimination."

Mr. THOMAS. They are not tantamount to discrimination.

Senator KENNEDY. That was in June 1985. Now you are back up here in July 1986. You say that you will change it, and quite frankly, the tone of your answers today are a good deal different from "are not tantamount to discrimination." In your response to questions you indicate that there are other factors that ought to be considered.

Mr. THOMAS. Well, I think that "not tantamount"—they are not the equivalent of discrimination. Every statistical disparity is not discrimination. Otherwise, the——

Senator KENNEDY. You did not say "every one"; you said that "statistical disparities are not tantamount to discrimination."

Mr. THOMAS. They are not.

Senator KENNEDY. What about the workmen situation; do you think that is tantamount?

Mr. THOMAS. Senator, when we get those cases, we look——

Senator KENNEDY. Is that tantamount?

Mr. THOMAS. The example you gave me, I think, makes an excellent prima facie case of discrimination.

Senator KENNEDY. Do you have any question in your mind as to what Congress intended when the United States passed that legislation? Did you think that Congress would find that?

Mr. THOMAS. That in the example that you gave me——

Senator KENNEDY. The kind of situation I gave you.

Mr. THOMAS. The example that you gave me, I indicated I have no problems with. But it is not as simple as that in most of the cases that we get. The Griggs kind of situation is pretty rare now. The way that the statistics are used are a lot more complicated than the example that you gave me, Senator.

Senator KENNEDY. As I understand, you are saying that you have a different understanding of that particular provision of the legislation dealing with disparate impact than you had in 1985. Am I correct in assuming that you are going to promulgate regulations sometime in the future and you will not tell us the criteria today? Am I missing something?

Mr. THOMAS. Senator, I said that the example that you gave me was fine; I have no problems with that. The guidelines have been the subject of debate since they were adopted in 1978. They are not universally accepted by everyone, as it appears in the media sometimes. That is not true. There are problems with the guidelines. The guidelines are enormously complex. The guidelines have testing provisions and recordkeeping requirements that are subject to debate.

What we have attempted to do, Senator, what I attempted to do—I have my own personal opinions about things—but I have attempted with respect to those guidelines to go back and to look at all the criticisms, to look at all the case law, applicable case law, et cetera, and then to form a basis to make proposals to the Commission, so we all start at the same point.

One of the problems we have with the guidelines is that EEOC does not have a repository, it does not have the background documents on the initial formulation of the guidelines. I think that it is inconceivable that an agency that adopts a guideline or adopts any regulatory measure does not have the background documents to support it. So the first thing we did was to go back and to formulate that. That has taken us quite some time.

Senator KENNEDY. Of the various disparate impact cases that have been brought by the agency, what ones trouble you the most that have been decided under the existing guidelines?

Mr. THOMAS. The one that troubles me the most is the Sears case.

Senator KENNEDY. And beyond that?

Mr. THOMAS. There is an IBM case out of Baltimore. The same thing—very broad statistical disparities, both of which, needless to say, we had some problems with.

We have had some internally. We do adverse impact cases all the time. But it is more than just taking one broad set of numbers and comparing those numbers.

Senator KENNEDY. So Sears and IMB.

Mr. THOMAS. Those are litigated cases. The others are confidential cases inside.

Senator KENNEDY. And how many of those have you——

Mr. THOMAS. Senator, I do not know. We do hundreds of cases. We reviewid last year over 700 cases for litigation, and I cannot give you an exact percentage.

Senator KENNEDY. In the application of the existing guidelines, what has been the most egregious situation that you find in the application of the current guidelines?

Mr. THOMAS. I gave a couple, several examples—again, remembering that these cases that we consider for decision are normally confidential cases; they are not reported cases. I gave several examples in a hearing before on this. One, for example, was the case involving one person, just one person. There was a selection rate of 64 percent for black individuals and a very small work force, and one person would have then put the selection rate at 87 percent. That again is a rigid application of the guidelines and a statistical disparity.

Senator KENNEDY. If you change that by a couple of percentage points, would that meet your guidelines? Exactly what are you talking about in terms of changing the guidelines? That is very important to me. It might not be to others, but I want to know whether you are talking about along the edges, or are you talking about a significant change. I cannot say that anything you have said this morning does not involve a significant change. If you are talking about the edges, then that might be different, but I cannot make a judgment on something which is so basic and fundamental in terms of employment, when you say that you wanted to change these guidelines over a year ago. And now you come back to our committee and do not give us any indication of what the changes are, other than making some observations about egregious situations. All of us understand that in the application of general law there is always—tragically and unfortunately—some injustice.

Mr. THOMAS. Senator, I have had numerous opportunities to prejudge precisely what I was going to propose. I have taken none of them from either side. It is my job as Chairman of this Commission to go back and to do all of the underlying work on these guidelines and make proposals that are consistent with existing law, regardless of what my personal opinions are. I have said that to individuals who wanted me to change them before, and I say it now.

You are asking me to do the same thing I refused to do for others 4 years ago—to prejudge precisely what the changes are going to be. I do not know.

Senator KENNEDY. How in the world are you going to have predictability and certainty if you do not know?

Mr. THOMAS. Well, I would have predictability and certainty if——

Senator KENNEDY. How can we expect companies and corporations to understand what we are doing if you do not have predictability certainty?

Mr. THOMAS. Senator, I will propose to the Commission changes based upon the background document, which is approximately 600 pages, that we have done. We could have done it on short statements, people's personal opinions or ideology. There is the impact

of the *Teal* decision, which knocks out bottom line. We have got to look at that. We are not the only ones who have problems with the guidelines.

Senator KENNEDY. Let me move on. As I understand, the staff of the House Education and Labor Committee has interviewed regional enforcement authorities of the EEOC. They found that the Commission has reportedly renounced the adverse impact theory to prove discrimination, and that when cases are referred to headquarters for approval, EEOC lawyers, and I quote, "must articulate other theories to prove discrimination."

Are you aware that such instructions have come from the Commission?

Mr. THOMAS. Senator, that is absolute nonsense.

Senator KENNEDY. You had nothing to do with that?

Mr. THOMAS. There is no such policy.

Senator KENNEDY. OK. Let me go to another area, and that is the pension accrual for older workers. You are aware the Commission has voted twice that it is a violation of the Age Discrimination in Employment Act for an employer to discontinue the accrual of pension benefits for workers over 65. The Commission has yet to implement regulations implementing that decision. As a result, millions of dollars in pension benefits have not been paid to older workers. The committee is aware that on several occasions members of the Commission and staff of the Commission have attended meetings with the Office of Management and Budget concerning these regulations.

Have you attended such meetings?

Mr. THOMAS. I have attended several informal meetings, but not specifically on the pension accrual. Staff members have done that.

Senator KENNEDY. Were you at meetings where this was discussed?

Mr. THOMAS. I was at meetings where it was discussed, Senator.

Senator KENNEDY. Was that in June 1985?

Mr. THOMAS. No; that was not in June. That was staffers, career, and a member of my personal staff attended that meeting.

Senator KENNEDY. Are you aware that Mr. Zuckerman indicated that you were present, in a letter dated March 17, 1986——

Mr. THOMAS. There was a meeting having to do with the regulatory agenda, but not with the moving of the regulations themselves through OMB.

Senator KENNEDY. Mr. Zuckerman said, "I have attended four meetings at OMB, at which the pension benefits issue has been discussed."

Mr. THOMAS. That is right. He was a member of my staff.

Senator KENNEDY. One of those dates is June 17, and one of the people there was yourself.

Mr. THOMAS. I believe the only meeting that I have attended specifically involving pension accrual, to my knowledge, had to do with whether or not it appeared in the regulatory agenda.

Senator KENNEDY. When was that?

Mr. THOMAS. I cannot remember, Senator.

Senator KENNEDY. Does June 1985 make sense, or not?

Mr. THOMAS. Well, it could be June, it could be July. I would have to go back and look at my calendar. It makes sense.

Senator KENNEDY. Would you look at it later and just let us know?

Mr. THOMAS. It makes sense.

The Chairman. Would you go through your memoranda and supply that?

Mr. THOMAS. But let me go back, with respect to the post-normal accrual of pensions and straighten that out.

Senator KENNEDY. Do you remember what was said and by whom at that meeting, or the meeting that took place in June?

Mr. THOMAS. Well, we argued vehemently to move the guidelines through. There were previous meetings for that. The problem is very simple. The solution is the most difficult part. The EEOC——

Senator KENNEDY. That is generally so. I am sorry.

Mr. THOMAS. The EEOC became part of the executive branch in the reorganization, which is different from any other of the Commissions around town, the Federal Trade Commission, the FCC, et cetera. As a result of that, we have to go through OMB like any of the other executive branch agencies, to get our regulations through.

And the saga—our involvement with this particular guideline, as far as I am concerned, is a clear example of the maxim that "No good deed goes unpunished." I resurrected those guidelines, those regulations, in an attempt to move it through. The OMB had some concerns about it, and indicated that we had to do an impact analysis, a regulatory impact analysis. That has been the single longest problem that we have had with that. We have just recently completed it and approved the impact analysis, to formally send the whole document over to OMB.

But this is the second time. The first time was at the end of the last administration, and then it was deep-sixed.

Senator KENNEDY. Do you have a copy of that? Do you have a copy of the document that you submitted to OMB?

Mr. THOMAS. We have not submitted it yet, the impact analysis. I do not know whether or not—I do not have a problem with the document per se. I do not know whether or not we are supposed to release that.

Senator KENNEDY. Well, you support it, do you not? You support the document that you are about to submit to the OMB; is that right?

Mr. THOMAS. The change in the pension accrual——

Senator KENNEDY. Yes.

Mr. THOMAS. Oh, certainly. I am the one who resurrected it.

Senator KENNEDY. All right, is there any reason that we cannot review it?

Mr. THOMAS. No; it has been in circulation for 2 years. There is no problem with it.

Again, the Commission unanimously voted to——

Senator KENNEDY. Could you get it for us?

Mr. THOMAS. I have no problems with it. It is a public document.

Senator KENNEDY. Could you supply it to the committee, please.

Do you know whether there are any recordings or transcripts of those meetings?

Mr. THOMAS. Senator, the most that occurred in those final meetings that I was involved in was whether or not it would appear in

the regulatory agenda. To my knowledge there is absolutely no recording. It is a coordination function. It is a part of our obligation under the Executive order. It was not a part of the open meeting.

Senator KENNEDY. If it has been in circulation for 2 years, what is the possible rationalization or justification for that?

Mr. THOMAS. Senator, when you have to get regs through—it has been longer than that, actually, and I think that is a concern of the various interest groups, because it was originally passed in 1980 and withdrawn from the agenda by the previous Commission. Then I resurrected it and voted on it, and the problem has simply been that in order to get an impact analysis done, we have got to go through this long process of letting the contract, bidding the contract, getting back the bids, picking the contractor, then having the impact analysis done. In addition to that, you add the fact that we had discussions with OMB about whether or not we should have it in the first place. We did not think we should. But again, the final decisions on disputes with respect to regulations are made by the Executive Office of the President, again pursuant to the appropriate Executive orders. So again, it just takes a long time.

Senator KENNEDY. More than 2 years?

Mr. THOMAS. Senator, I did not put the procurement process into place.

Senator KENNEDY. What did they tell you over there at OMB?

Mr. THOMAS. That if the impact is going to be over $100 million that you have got to do an impact analysis.

Senator KENNEDY. Yes; but why does it take over 2 years?

Mr. THOMAS. Senator, I think any agency——

Senator KENNEDY. When was the last time you called OMB?

Mr. THOMAS. I have had personal discussion—they have got a new group of individuals there now—with them on several occasions in the past few months. But we had to await the completion of the impact analysis, which was done by a private contractor.

Senator KENNEDY. When do they tell you that the impact analysis will be completed?

Mr. THOMAS. That has been completed, and we are prepared to submit that to OMB. That has been completed about a month ago and was approved by the Commission recently.

So the entire package is now ready to go. The underlying regulations were ready for quite some time. But a part of the package to submit to OMB has to include the impact analysis; it is as simple as that.

Senator KENNEDY. How does it differ from what you had initially submitted?

Mr. THOMAS. None. But it has the impact analysis.

Senator KENNEDY. Mr. Chairman, I have taken a good deal of time. I have got some other areas to cover, but I know my colleagues are waiting to question Mr. Thomas.

The CHAIRMAN. Well, thank you so much, Senator Kennedy.

We will turn to you, Senator Metzenbaum.

Senator METZENBAUM. First, Mr. Thomas, you were asked to submit the list of articles you have written, and you said, "See attached," and as you well know, eight of the articles are all the same article. I guess you felt that you should list them, because

they were published at different places, and that is fine. Then you have one other article.

Are there any other articles that you have written?

Mr. THOMAS. I have refrained. I have not had the time to do a lot of writing. I give some speeches, but that is about it. To my knowledge, I have not written any, and I do not have a file of written articles.

Senator METZENBAUM. You have no recollection of any others at all?

Mr. THOMAS. There have been some speeches that I have given that have been reprinted, but I cannot remember articles.

Senator METZENBAUM. What is this Stetson Law Review article?

Mr. THOMAS. That is a speech that I gave at Stetson that they reprinted.

Senator METZENBAUM. All right. Mr. Thomas, on May 9 in a letter supporting Jeffrey Zuckerman's nomination, you endorsed Zuckerman's objections to goals and timetables as a remedial approach under title VII because in your legal judgment—and I am now quoting—"courts may not order employers to hire people on the basis of their race, color, sex, religion or national origin."

In March, before the House Subcommittee on Employment Opportunities, you expressed the belief that title VII prohibits the use of goals and timetables, based on your reading of the *Stotts* decision. You also made clear to the House Subcommittee your support for Acting General Counsel Butler's 1985 directive that EEOC attorneys not seek goals and timetables as relief in Federal litigation.

In light of the Supreme Court's recent decision in the *Firefighters* case and the *Sheet Metal Workers* case, do you still believe the use of goals and timetables is unlawful under title VII?

Mr. THOMAS. Well, Senator, I do not think my beliefs have anything to do with it now that the Court has so ruled that they are lawful under title VII and the Constitution. I think that is the end of that.

Senator METZENBAUM. In the *City of Cleveland* case, the *Firefighters* case, the Supreme Court clearly held that voluntary race-conscious affirmative action incorporated into a consent decree is permissible under title VII. The Court further held that the Government has the same latitude as a private party to seek out or agree to such affirmative action relief.

As Chairman, what if any specific steps will you now take to see that the EEOC seeks or agrees to the use of goals or timetables when negotiating consent decrees in the future?

Mr. THOMAS. Well, I think we are prepared to—in fact, I intended to do it previously, before this hearing—to simply inform our attorneys and our district directors that they are now to seek goals and timetables or the race-conscious or sex-conscious remedies permissible under the rulings of the Supreme Court.

Senator METZENBAUM. When do you expect to do that, Mr. Thomas?

Mr. THOMAS. It is just a matter of a couple of days; it is no problem.

I think we are instructing general counsel and the head of our program offices to do that.

Senator METZENBAUM. Will that be done before your confirmation?

Mr. THOMAS. Yes. That is no problem. It is just a matter of a letter. I mean, the law is the law, and I have said clearly—I said in the same hearing that you quoted from—that when the Supreme Court ruled, that was the end of it. I do not have a problem with that.

Senator METZENBAUM. Can you make a copy of your direction to your attorneys available to the committee?

Mr. THOMAS. Yes. That is no problem.

Senator METZENBAUM. In the *Sheet Metal Workers* case, the Supreme Court held that title VII may require a district court to impose goals and timetables where an employer or union is engaged in egregious discrimination or under certain other conditions. The Court stated in such circumstances goals and timetables may be the only effective way to ensure the full enjoyment of the rights protected by title VII.

Other than that which you have stated you intend to do with respect to the attorneys as pertains to consent decrees, what other specific steps will you take to seek such court-ordered relief?

Mr. THOMAS. I think it is clear, Senator, when the cases come before us for approval—a number of these cases do not come to the full Commission for approval—the attorneys and the district directors have latitude to develop the remedies. I have stated clearly that when the Supreme Court ruled and gave us direction in this particular area, we would follow that direction. All the cases are not the same; they are not carbon copies. There are different remedies that are more appropriate. We think that a lot of the creative remedies that we have developed are excellent. In some of those instances, again consistent with the Supreme Court decision, goals and timetables are one of the remedies available. And our district directors and our regional attorneys who develop these remedies will be given the latitude to include goals and timetables consistent with these decisions.

Senator METZENBAUM. Have you directed your Acting General Counsel Butler that EEOC attorneys could negotiate or seek to have courts impose goals and timetables where appropriate, or is this what you intend to do within——

Mr. THOMAS. That is what we are going to do. It is just a brief statement that they are now to seek goals and timetables in appropriate cases.

Senator METZENBAUM. You mentioned that there are other remedies that may be available or that may be appropriate. Do you have any further reservation with respect to the use of goals and timetables as an appropriate remedy for the EEOC to seek?

Mr. THOMAS. Senator, I think again, the Supreme Court has ruled, and as far as I am concerned, that is that. Whatever reservations I have are purely personal, and they are subversive literature at this point.

Senator METZENBAUM. Did I hear you use the words, "subversive literature"?

Mr. THOMAS. Dissenting opinions, according to J. Willie Moore, are nothing but subversive literature.

Senator METZENBAUM. The EEOC over the past 9 months has declined to seek affirmative action. During that period, you publicly stated your constitutional, legal, moral, and ethical opposition to the use of what you called preferences and quotas at an affirmative action conference in New York City.

If you have such moral and ethical opposition, the legal problem has been solved because it seems the Supreme Court has spoken; but what about this moral and ethical opposition? Is that still going to provide any reservation for you?

Mr. THOMAS. Senator, I have indicated in every context where the issue of goals and timetables has been raised with respect to my job as Chairman of EEOC that I would abide by the Supreme Court rulings on it. And the Supreme Court has ruled. That is the law of the land. Whether I like it or not, I am to abide by it. I take an oath to enforce the law, and I enforce it aggressively.

Now, with respect to my opposition to counting by race, I have a problem with that—I have had a problem with that. I was counted by race. Again, you do not go unmarked in society when you are the one counted out because of your race. Now, that is a part of my own history, a part of my biography.

I have said that goals and timetables are part of the remedies that we are to seek, and I would enforce it, and that is the end of it.

Senator METZENBAUM. Have you done anything on affirmative action at all since the Supreme Court decision?

Mr. THOMAS. We have not had any cases.

Senator METZENBAUM. Well, have you made any statements: have you sent any letters? Have you said anything at all on the subject?

Mr. THOMAS. Well, first of all, the only people who asked were the press, and I did not see any need to comment. The Supreme Court decisions spoke for themselves. Other individuals around the agency speak about it, but that is pretty much it. I have given no speeches. I gave one speech—excuse me—in Anchorage, AK, in which I indicated that, thank God, the debate is over, and now we can get on with our work.

Senator METZENBAUM. Did you indicate anything further in that speech as to your intention to live up to live up to the responsibilities——

Mr. THOMAS. I have always intended that. If I cannot do the job, if I cannot enforce the laws under the jurisdiction, then I will just quit. I do not have a problem with that. I have other things I could do.

Senator METZENBAUM. Let me then ask you categorically, will EEOC make a clear statement, commitment to goals and timetables as one form of relief in order to dispel the confusion resulting from its waffling on this issue in recent months?

Mr. THOMAS. EEOC will make a clear statement to our people that goals and timetables are one form of relief available under title VII, consistent with the Supreme Court.

I mean, that is that.

Senator METZENBAUM. And that will be done within the next few days?

Mr. THOMAS. That is right. That has already verbally been done. It is just a matter of codifying it.

Senator METZENBAUM. The Supreme Court in *Sheet Metal Workers* carefully noted that the EEOC had joined the plaintiffs in seeking affirmative action relief from the lower court and had argued to the Second Circuit that *Stotts* in no way bars such relief. You then abandoned this position in the Supreme Court and embraced the Justice Department approach, which has now been conclusively rejected.

Why did the EEOC change its position after 13 years of litigation, including 3 years of your tenure? In other words, how can we expect you to stand up to the Justice Department on this issue in the future, and will it be you or the Meese-Reynolds team that really decides EEOC policy on affirmative action?

Mr. THOMAS. All cases argued in the Supreme Court are argued by the Solicitor. We have, in addition to that, a majority of the Commission at the time who had problems with—who believed that under title VII that some of the relief involving goals and timetables—or, goals and timetables were not available under title VII. That is ended, it is over. I mean, there is no argument left with respect to what the Supreme Court has ruled on.

The *Sheet Metal* case was a case of bad actors; we all understood that. We make our suggestions to the Justice Department. We argue our position. The Solicitor, I think, is an excellent Solicitor who listens, for example, in the *Vinson* case, who listens to our point of view and argues our point of view. In some instances, you do not win. But only one person can argue for the executive branch, and that is the Solicitor.

Senator METZENBAUM. Well, Meese and Reynolds have indicated that they are not quite that prepared to accept the decision. Will they be calling the shots, or will the EEOC?

Mr. THOMAS. Senator, the Justice Department has litigation authority for, one, the executive branch, which includes EEOC, and unless we have specific statutory authority to litigate in cases in which the Attorney General litigates, we are out. Those cases in which the Attorney General has specific statutory authority involving title VII to litigate are in the public sector cases where most of these arise. And ultimately, the Solicitor has the authority to argue in the Supreme Court of the United States.

EEOC is not an independent agency, and it should be.

Senator METZENBAUM. What does that mean, now?

Mr. THOMAS. It means that the ultimate decision in the public sector cases will be made at the Justice Department, and the ultimate cases being argued in the Supreme Court will be made by the Justice Department.

Senator METZENBAUM. And how will you fight for the EEOC position——

Mr. THOMAS. As we always do. I mean, you go over, you prepared your documents, and you go over and fight like every other agency. That is just the process. There is one lawyer for the Government in the Supreme Court of the United States.

Senator METZENBAUM. As you well know, Mr. Thomas, this is a terribly important area, and I want to be sure this committee is informed about EEOC progress in enforcing the law as Congress

and the Supreme Court intend. I would therefore request that you submit 6-month summaries to this committee, briefly describing each case in which the EEOC seeks, agrees to, or declines to participate in the use of goals and timetables as part of a consent decree; and second——

Mr. THOMAS. Wait a minute, now. I missed that—6 months past, or 6 months following?

Senator METZENBAUM. Future; every 6 months in the future.

Mr. THOMAS. That we decline because of the use of goals and timetables.

The CHAIRMAN. Yes, you have got to decline that. You are not going to have a case-by-case review of this outfit up here. Maybe if somebody else is chairman, you can have it, but I would not do that. If I were in the executive department, I would tell us to go to hell, I really would.

That is ridiculous.

Senator METZENBAUM. It is a report, Mr. Chairman——

The CHAIRMAN. I mean, why don't you just get them and read them? I mean, let's not burden them; let us have them work on discrimination.

Senator METZENBAUM. Well, Mr. Chairman, I think the committee does have oversight responsibility——

The CHAIRMAN. We do, but it should be reasonable, Howard.

Senator METZENBAUM [continuing]. And I think that therefore we are entitled to know whether or not the EEOC is seeking or declining to participate in the use of goals and timetables as part of a consent decree, and we also are entitled to know whether or not the EEOC is attempting to persuade a court to order affirmative action relief that includes goals and timetables.

The CHAIRMAN. Well, are these cases published? Are the decisions published?

Senator METZENBAUM. They are not all published.

Mr. THOMAS. The decisions are confidential with respect to the litigation. The intervention—and of course, the cases are a matter of record.

The CHAIRMAN. That is what I am saying.

Mr. THOMAS. The problem that we do have, Senator, is that once we begin to breach the closed sessions of our meetings, then we have no defense with respect to discovery in litigation.

Senator METZENBAUM. Well, you could very well redact the names of the litigants in order to protect their privacy, couldn't you?

Mr. THOMAS. No, no.

The CHAIRMAN. Do you want these cases before they decide them down there; is that what you are saying?

Senator METZENBAUM. No——

Senator KENNEDY. He is trying to find out, if the Senator would yield, what the test is that is being used.

Mr. THOMAS. First of all, it is rare that we get any of these cases. I mean, it is rare.

Senator METZENBAUM. Then there would be very few that you would have to report to us.

Mr. THOMAS. Our problem, Senator, goes beyond—I do not care whether you have the documents. Our problem is that once we

breach that process, we have no protection for our closed session considering confidential information.

Senator METZENBAUM. Well, as long as you eliminate the names, you would have no problem in providing us that information.

Mr. THOMAS. Well, Senator, can we engage in some kind of discussion so we can protect our process? I do not have my legal counsel here; I do not have the individual here.

Senator METZENBAUM. We would be happy to do that.

Mr. THOMAS. I do not know whether we can do it. I think it is a real problem. This is the second time we have had discussions about breaching the closed session of our meetings.

Senator METZENBAUM. Why don't you just send them to the Labor Committee without publishing them?

The CHAIRMAN. Wait. First, let us ask what are you asking for? Are you asking for cases that are decided, or are you asking for cases in esse?

If you are asking for cases in esse, he cannot do that, and he cannot do that because the mosaic alone would disclose confidential information that is crucial for them to decide the case.

Now, if you are asking for published cases, we can get those. I mean, you can send those to us.

Senator METZENBAUM. We are asking for each case after it happens to determine whether or not they did seek or declined to participate in the use of goals and timetables as part of the——

The CHAIRMAN. Their decision as to whether they are going to pursue it, whether they are going to go into court—you cannot have the whole strategy of what they do.

Senator METZENBAUM. I think what we are talking about, Mr. Chairman, is we have before us an individual who is up for confirmation who has in the past indicated his opposition to goals and timetables. Now the Supreme Court has spoken——

The CHAIRMAN. He has also said the Supreme Court has spoken, and he is going to follow it, and he has given verbal directions to do so, and he will put it in writing.

Senator METZENBAUM. That is right, and I accept what he has said. But I believe that this committee has a responsibility to determine whether or not his actions are equal to his words.

The CHAIRMAN. I think once the decisions are made and are published, yes, we can determine that.

Senator METZENBAUM. Well, but the fact is——

The CHAIRMAN. You cannot interfere with their deliberative process—you cannot.

Senator METZENBAUM. Well, Mr. Chairman, if the decision is that they are not going forward and seeking that goal or timetable, we are entitled to know that. We are entitled to know whether or not they are refusing to use goals and timetables, affirmative action, as a part of their process. They can say they are, but if time after time after time they do not do so, then I think this committee ought to know about it.

The CHAIRMAN. I do not disagree. Let me just say this. I do not disagree in one regard. But the question is when—when should you provide that information.

Mr. THOMAS. The problem that I have is not with disclosing information for the public record. The problem is that in order to get

that information, you are undermining our ability to preserve the confidentiality of our deliberative process.

Now, you say you are talking to a person who does not agree with goals and timetables. I did not agree with them when I enforced them within the Federal Government, where we have 99 percent compliance.

We also utilized them in the General Motors agreement, but I did not agree with them.

I am not saying to you—I have given my commitment, and obviously, that is not worth anything, that we will obey the law. I have said it time and time and time again. I am not accepting—I am not going back to this position to defy the Supreme Court.

And my problem is with the deliberative process. Once you open that up, individuals who have some problems with the way that we have brought litigation against them begin to discover our discussions during the closed session of our meetings when we vote to litigate their cases. I have a real problem with that.

Senator METZENBAUM. Well, Mr. Thomas, I think you had suggested that perhaps we can work out a way to operate. And between now and the actual meeting of the committee, I would suggest that you or your representative meet with my staff and the staff of the committee to see whether or not we cannot work out some way that we can live with this so that we will be able to perform our duties.

The CHAIRMAN. I think we can work that out, but I agree we cannot get into their deliberative process, or we undermine what they are trying to do. I think we have to have your commitment to abide by the Supreme Court decisions, no question about that, and you have already made that commitment.

Senator KENNEDY. The only point, Mr. Chairman, we have got access to information to be able to make judgments which we do not reveal or make public. The Judiciary Committee, and for years, the Antitrust Committee had the most sensitive documents on market ratios in terms of oil companies to carry forward and that never was revealed. We get FBI reports on individuals; we do not make those public. I mean, there are a lot of things that go through our committee process, in examining various witnesses and the functioning of various agencies that we get which we keep confidential.

So I think in fairness to the nominee, quite frankly—I mean, these are the questions that you heard from me, and you are now hearing from Metzenbaum—all we want to do is find out what the record is. I for one do not question your own sincerity. It is just a question of whether you are applying it the way that others—you might say it one way——

The CHAIRMAN. The way that I want you to apply it.

Senator KENNEDY. The way that it has been applied in the past. If we have a difference on it, we want to know it, so we can make a judgment. And that information, I think, is both fair to you, and it is fair to us.

The CHAIRMAN. Well, let us see if we can work that out so it is an acceptable thing.

Mr. THOMAS. I would like to make one point.

The CHAIRMAN. You get your staff and so forth to work it out.

Mr. THOMAS. We will do that. I would like to make one point. No matter what the disagreement has been with individuals with me in this city, my word is my bond, and that is it. And nobody can say that I have gone back on that.

The CHAIRMAN. Nobody is questioning that.

Senator METZENBAUM. We are not questioning your word, we are not questioning that.

The CHAIRMAN. I do not think they are questioning your word. But let us do that. There are parameters that we should not invade, and there are parameters you ought to meet, too, and I think we can work those out. But you know, in the Judiciary Committee, we do get some interesting things, but we do not get into what judges' deliberation processes are, and I do not think we do it very often with success in the administrative deliberative process. So let us just work it out to the extent that we can. I think you will be cooperative.

Senator METZENBAUM. Mr. Thomas, under EEOC Management Directive 707, Federal agencies are given detailed instructions for developing and implementing affirmative action plans. For several years, the Justice Department and other Federal agencies—State, Education and others—have placed themselves above the law by refusing to submit an affirmative action plan that contains goals and timetables.

What are you doing to enforce MD-707 against the Justice Department and other agencies that flaunt your directive, and what can we in Congress do to help you in this respect?

Mr. THOMAS. Well, without getting into the substance of the disagreement, this has been something that has been going on for 4 years. But let me note parenthetically that we have close to 100 percent compliance with Management Directives 707 and 711.

Now, there is no enforcement provision for the affirmative action components of title VII in the Federal Government.

Senator METZENBAUM. Would you favor enactment of a bill that would create a cause of action for the EEOC and for aggrieved individuals against an agency that fails to develop and carry out an effective affirmative action plan?

Mr. THOMAS. I would favor any kind of enforcement mechanisms not only for that, but an improvement in title VII enforcement provisions, across the board.

Senator METZENBAUM. Well, does that mean yes, you would favor legislation——

Mr. THOMAS. I do not know whether a cause of action—any enforcement provisions that are effective. I think that matter would have to be worked out as to exactly what it would be. If the government is suing the government, I do not know whether that is possible.

Senator METZENBAUM. Well, what kind of enforcement action can there be? If you do not have the authority now, then Congress has to give you that authority or give the aggrieved individual that authority, or both.

Mr. THOMAS. I think Congress has the enforcement authority now, just simply doing oversight.

Senator METZENBAUM. Oversight does not resolve the problem.

Mr. THOMAS. Yes, but in the Appropriations Committee and the Oversight Committee, it has a way of getting your attention.

Senator METZENBAUM. Well, are you suggesting we cut off the funds of a department of Government if they do not——

Mr. THOMAS. It gets my attention, OK, regardless of whether you cut off the funds. I mean, to appear before your appropriations committee and your oversight committee on these issues does get your attention. But I think that that provision does need some kind of enforcement mechanism if it is going to work.

Senator METZENBAUM. Well, under your leadership, the EEOC announced its intention to revise MD–707 by September 1985 in order to eliminate the use of goals and timetables by Federal agencies. Has that new directive been completed?

Mr. THOMAS. We have postponed that. Again, one of the things that I thought was important was that whatever direction the Supreme Court set, that we have the benefit of that and then to utilize or involve that in whatever decision we made.

Senator METZENBAUM. Will you announce any proposal to modify MD–707 at least 60 to 90 days before it is finalized and provide adequate opportunity for public review and comment?

Mr. THOMAS. It has to be done long before that. That is why we had to not issue them. We have to coordinate with the other agencies first, and we are talking approximately 5 or 6 months before there are any changes made.

Senator METZENBAUM. Will you send the members of the Committee a copy of any public notice at the time——

Mr. THOMAS. We could do that. I will make a note to do that.

Senator THURMOND. Mr. Chairman, I wonder if the able Senator from Ohio would just give me 5 seconds?

Senator GRASSLEY [presiding]. Will the Senator yield?

Senator METZENBAUM. For 5 seconds, I yield to the distinguished President pro tempore.

Senator THURMOND. Thank you very much.

Mr. Chairman, I have a statement strongly endorsing Mr. Thomas and to save time I am just going to put it in the record.

Senator GRASSLEY. Without objection.

Senator THURMOND. Thank you.

I think he has done a fine job, and he should be confirmed.

Thank you very much.

Mr. THOMAS. Thank you, Senator.

[The prepared statement of Senator Thurmond follows:].

STATEMENT BY SENATOR STROM THURMOND (R-S.C.); BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES REFERENCE NOMINATION OF CLARENCE THOMAS TO BE CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SD-430, JULY 17, 1986, 2:00 P.M.

MR. CHAIRMAN:

I would like to voice my support for the nomination of Mr. Thomas to serve another five years as Chairman of the Equal Employment Opportunity Commission (EEOC). I believe that he is eminently qualified to continue service in the high post entrusted to him by President Reagan.

Mr. Thomas has served as Chairman of the EEOC with distinction and ability. His leadership as Chairman, and his past career background, demonstrate the high capabilities of Mr. Thomas.

His past employment experiences include service as Assistant Secretary for Civil Rights at the Department of Education; legislative assistant to Senator John C. Danforth (R-MO); counsel for the Monsanto Company; and Assistant Attorney General of Missouri.

Mr. Thomas graduated from Holy Cross College and is a member of the Board of Trustees of that institution. He attended Yale Law School and received a J.D. degree in 1974.

Throughout his career, I believe Mr. Thomas has exhibited the legal and administrative skills that are an absolute necessity in running an agency with 3,000 employees and a $100 million budget.

Mr. Chairman, upon reviewing the testimony we will receive today on this fine gentlemen, I am confident that my colleagues will join me in urging the speedy confirmation of Mr. Thomas.

Unfortunately, other duties of the Senate require that I must leave at this time.

Senator GRASSLEY. Senator Metzenbaum.

Senator METZENBAUM. I have just a few more questions.

I have been critical of your position with regard to affirmative action, but I also want to give credit where credit is due.

In November 1985, you served the public well when you and your colleagues recommended Government participation on the side of the plaintiffs in city of Riverside against Rivera. You argued that a rule restricting attorney fees where the monetary recovery is small would result in less than full relief for individual victims and would discourage private attorneys from taking title VII cases that involve only individual claims.

Although the Justice Department rejected your recommendation, your position was vindicated by the Supreme Court last month.

What role should the Commission now play in shaping the administration's position on attorney fee awards in the future?

Mr. THOMAS. Well, let me move back a bit. I think the Commissioners have indicated that in the enforcement of civil rights laws, particularly the EEO laws, that you need some kind of incentive for private litigators, private attorneys, to be involved in that, because we cannot do all the case—it is as simple as that. And in some of them, the reward is not actually the monetary reward.

I think that the Commission—as I have felt in all civil rights and EEO matters—should play, particularly in EEO matters, the central role, the lead role.

Senator METZENBAUM. That the Commission should play——

Mr. THOMAS. That is right.

Senator METZENBAUM. There is now a bill pending in the Judiciary Committee that would limit attorney fee awards to $75 an hour in civil rights cases brought against Government defendants. Do you support that approach?

Mr. THOMAS. I have not looked at that bill. The normal way for supporting or commenting on legislation within the executive branch is to have it cleared through OMB.

Senator METZENBAUM. Do you have a personal point of view?

Mr. THOMAS. I do, but I do not think it is relevant.

Senator METZENBAUM. Well, although it is not relevant, would you share it with us?

Mr. THOMAS. I would be more than happy to share it with the Senator off the record, but the wrath of OMB is not coming down on my head.

Senator METZENBAUM. Well, you are probably discreet.

I have some other questions I will submit for the record. I see that Senator Simon is here and is waiting very patiently. But I have some questions, and I hope you will be able to respond to them prior to the markup.

Mr. THOMAS. Thank you, Senator.

Senator GRASSLEY. The Chair recognizes Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

In response to one of the questions of Senator Metzenbaum, you, in referring to the reports you make to OMB and the Justice Department, said that your agency "should be independent"; did I hear correctly?

Mr. THOMAS. Yes, I did say that, Senator.

Senator SIMON. So that if we could change the statute to give greater independence, it would improve the effectiveness of your agency?

Mr. THOMAS. That is right.

Senator SIMON. I think that is important for us to know.

Let me express candidly my concern. When I get a letter like this from the NAACP saying:

> The National Association for the Advancement of Colored People has grave reservations regarding the confirmation of Clarence Thomas to a second term as Chairman of the Equal Employment Opportunity Commission. Our opposition is premised on the fact that the Commission under Mr. Thomas' leadership has been derelict in its enforcement role and has voiced strong opposition to affirmative action.

I guess——

Mr. THOMAS. Do they give you any facts, Senator?

Senator SIMON. Well, this particular letter does not have, but there are other letters—and I am going to be questioning you about some of these—that do contain at least some facts—you may wish to interpret them differently than others have.

But when I read your testimony, in 1982 you say that, "I do not believe that there should be a wholesale abandonment of any sort of numerical timetables, at least as monitoring devices. They are necessary in monitoring some sort of progress in certain areas."

In response to a question by Senator Eagleton, you say, "In my present job, I have found that the need for data, the need for goals for monitoring progress, are there."

And yet before the Labor Subcommittee on the House side you say, "I do not support the use of goals and timetables. I do not think as a practical matter that they work."

I guess my concern is this, bluntly. I want someone who heads your agency who is not going to just dance around the edges of the problem, but who is going to march, who is going to see that people who may not have all the talent that you have also have an opportunity. And that sense of marching is what I miss.

In response to questions by Senator Metzenbaum on the Supreme Court ruling, the Supreme Court ruling—and I just reread it here—permits—it does not mandate—goals and timetables. But I want someone who is going to do not what you have to do, but who is out there leading the charge. And I do not sense that leading the charge on your part.

Now, what is wrong with what I sense?

Mr. THOMAS. I have just got a low-key personality. I am not much for this charismatic stuff. I am not much for making flamboyant speeches. I said that I was going to put an agency together that could operate, and that is what I intend to do. I intend to finish it. It is as simple as that.

In terms of commitment to civil rights, Senator, I always find that absolutely astounding that people could question others' commitment to anything. I may not agree on goals and timetables, but what is that an indicia of? I did not agree on quotas in 1964. I did not believe in race-consciousness in 1964. I was raised by two people who did not believe in it, OK—my grandfather, raised by a freed slave. So what is a commitment?

The agency—to work, in my opinion, 12, 14 hours a day, the frustrations of dealing with this kind of small agency, to get it to oper-

ate, that is commitment, not making speeches. Speeches are easy to write and deliver. That is commitment? Goals and timetables rarely come up at EEOC in these cases. There are 70,000 cases that we have got to figure out how to process and how to process well. Those are the little guys. Those are the insignificant cases that are not reported in BNA, that do not make national headlines. That is where the bulk of the work is.

And I think that we have gone to EEOC, and we have said that we were going to put a remedies policy in place that got something; that we were going to as Commissioners sit down and review these cases and make sure that every case got fair treatment, not short shrift, that we were not going to pick and choose, that we were going to enforce these cases for the people who relied on us, that we were going to have a system that worked, that we were going to have computers that dealt with information, that we were going to have management systems that held people accountable, that we were going to train our employees so that they knew the law better—it goes on and on and on—improve our delivery system.

It is wonderful, I think, to say I support this, or I support that. That is the easiest thing in the world. But to actually sit down and deliver is the hard job, and that is what we have the commitment to do, and that is precisely what we are doing. And that is why I am going through this to have 2 more years of going through that.

Senator SIMON. Well, I want to see delivery. But much of what you describe in the nuts and bolts things are things that your administrative assistant ought to be doing. And I guess it gets back to—for example, what do you really believe in goals and timetables?

Mr. THOMAS. Let me go back. An administrative assistant—the first thing that I did was eliminate the executive director. If you are going to run this agency, the person who heads the agency has to run it. That is something that we should have learned from the 21-year history of EEOC. And I think that my predecessor started doing that. She set it on a management course, and we are finishing it up.

Until you have that, you have nothing but a promise.

Now, with respect to goals and timetables, I indicated and I think my predecessor indicated, and I think others have indicated, that we need some way to monitor big cases. You can call it goals and timetables, you can call it just monitoring devices, or what-have-you. That is different from just throwing it out as a remedy. OK. I implement it at EEOC. I started the monitoring of cases on a systematic basis—even the cases including goals and timetables as a remedy. That is important—is any progress being made; are we achieving the purposes of title VII. Or have we just gotten something, and we are going to put it on the back burner and forget about it? That is important. But just to have goals and timetables every time you have discrimination, not even the Supreme Court said that you could do that. There is more to it than that. There are employment practices that are wrong that can be changed, and should be changed, not just give someone goals and timetables that they can shove in a drawer, recognize that it is never going to be monitored, and then never correct the discriminatory conduct. We want it all done. And the Supreme Court has now said that in cer-

tain cases, goals and timetables can be used. We intend to use everything that we can use, including goals and timetables.

Senator SIMON. OK. So if I follow you now, what you are saying is that goals and timetables can be a legitimate tool for effecting the goal of equality of employment opportunity?

Mr. THOMAS. It is one of the devices that we have in our arsenal, and we will use it.

Senator SIMON. Now, on the first part of your answer, let me just say, your job is not a custodial job. The administrative part is an essential part of it. That is part of Chuck Grassley's job as U.S. Senator from Iowa, it is part of my job as U.S. Senator from Illinois. I have to make sure the mail gets answered, that we do not exceed the budget by hiring too many employees and so forth. But I have to lead; you have to have a sense of direction of where you are going, and that is infinitely more important than that custodial function. The custodial function is essential, but the inspiration and the leadership is absolutely vital. And that, I want in your office and from you.

Mr. THOMAS. Senator, I am not a custodian of EEOC. My job is to provide leadership for the Agency and a direction. We have set the direction, we have set the course. And I think if anyone would spend some time looking at the Agency, you can see it—it is obvious. We are not running around in circles, chasing our tails. We intend to make EEOC an enforcement agency. I have said it, and I intend to deliver on it. That is why I have got to stay.

Senator SIMON. Now, in that connection, I have a letter from the Women's Legal Defense Fund, signed by Judith Lickman and Claudia Withers. They say that in 1980, the Commission filed 79 Equal Pay Act cases; in 1981, 50; in 1985, 15. Now, there is at least a superficial indication that the Commission is not moving aggressively.

Mr. THOMAS. Senator, with respect to cases that we file, we file every single case that fails conciliation where we have a cause finding. Eighty-five percent of those that the general counsel recommends for litigation, the Commission approves. We do not pick and choose them.

Now, we could go through them and just pick and choose EPA cases. Many of those cases are dual-filed under title VII and the Equal Pay Act. Equal pay tends to be very narrow, and I think if I were an employer, and I saw a difference like that, rather than letting it fail conciliation, I would settle it out. It is a very simple statute.

Senator SIMON. But you are being just as aggressive now as the Commission was in 1980.

Mr. THOMAS. Senator, we are filing more cases. In 1980 they filed 358 cases; in 1985, we filed 411. And it will go up. It should be up around 500 this year. I do not know what you read in those numbers, but the fact of the matter is that in terms of litigation, the cases that fail conciliation, of those that are recommended to us for litigation from our people, we approve 85 percent. That is predictable. You can expect that 8 out of 10 times when a case fails conciliation and is recommended for litigation, and 75 percent of the time, that case will go to litigation. Not 1 out of 10, not 1 out of 2.

Senator SIMON. I have no further questions at this point.

Senator Kennedy has requested that I ask this question: "Mr. Thomas, in reply to a question from Senator Kennedy, you said that the report of the Education and Labor Committee that EEOC has renounced the adverse impact test were false. Will you submit to the Senate Labor Committee any and all documents and records concerning orders made to EEOC attorneys regarding use of the adverse impact test? We are willing to work out whatever confidentiality protections are necessary and appropriate."

Mr. THOMAS. I do not have the slightest idea of any orders about the adverse impact test. I do not have the slightest idea. Now, maybe we can go back and discover some. But the adverse impact test was not the subject of any directive by this Commission to my knowledge.

Senator SIMON. And you are willing to provide any documents along that line, if any can be discovered?

Mr. THOMAS. If I can find some.

Senator SIMON. Thank you, Mr. Chairman.

Senator WALLOP [presiding]. Thank you, Senator Simon.

The record will remain open until the end of the day for any further statements.

[Additional statements submitted for the record and responses of Mr. Thomas to questions submitted to him follow:]

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July 29, 1986

Honorable Orrin G. Hatch
Chairman, Committee on Labor
and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed herewith is my testimony regarding the renomination of Clarence Thomas to serve a second term as Chairman of the Equal Employment Opportunity Commission. Thank you for leaving the hearing record open so that I may submit testimony on this very important matter.

I strongly urge that you and the members of the Committee on Labor and Human Resources who share my views that the effective enforcement of federal equal employment opportunity laws is of paramount importance, seriously consider the issues raised in my testimony when you deliberate the possible confirmation of Mr. Thomas.

I am also enclosing a copy, for your information, of a letter submitted to me by Women Employed, a Chicago-based women's advocacy organization, regarding this group's strong position in opposition to the confirmation of Chairman Thomas.

Sincerely,

Augustus F. Hawkins
Chairman

cc: Members of the Committee on Labor
and Human Resources

TESTIMONY OF AUGUSTUS F. HAWKINS
CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

BEFORE
THE COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE

ON

CONFIRMATION OF CLARENCE THOMAS
CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

JULY 23, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR GRANTING ME THE OPPORTUNITY TO SUBMIT THIS TESTIMONY REGARDING THE CONFIRMATION OF CLARENCE THOMAS TO SERVE A SECOND TERM AS CHAIRMAN OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. AS YOU KNOW, AS CHAIRMAN OF THE COMMITTEE ON EDUCATION AND LABOR OF THE HOUSE OF REPRESENTATIVES, I HAVE RARELY BEEN INVOLVED IN THE DELIBERATIONS OF THIS BODY CONCERNING APPOINTMENTS TO EXECUTIVE BRANCH AGENCIES. HOWEVER, MY CONCERN WITH THE EFFECTIVENESS OF THE ENFORCEMENT OF THE NATION'S EQUAL EMPLOYMENT OPPORTUNITY LAWS PROMPTS ME TO APPEAR BEFORE YOU TODAY TO EXPRESS MY GRAVE AND SERIOUS CONCERNS REGARDING THIS POSSIBLE REAPPOINTMENT.

I HAVE THREE PRINCIPAL RESERVATIONS CONCERNING MR. THOMAS' PROPOSED SECOND FIVE-YEAR TERM AT THE EEOC.

1) I AM CONCERNED ABOUT MR. THOMAS' POLICIES RELATING TO EQUAL EMPLOYMENT OPPORTUNITY LAW, INCLUDING THE USE OF GOALS AND TIMETABLES AS A REMEDY FOR EMPLOYMENT DISCRIMINATION, AND THE USE OF STATISTICS TO PROVE DISCRIMINATION;

2) I AM TROUBLED ABOUT THE WAY IN WHICH CHAIRMAN THOMAS HAS CONDUCTED THE BUSINESS AND POLICY-MAKING OF THE EEOC, IN POSSIBLE CONTRAVENTION OF THE ADMINSTRATIVE PROCEDURE ACT AND THE "GOVERNMENT IN THE SUNSHINE" ACT;

3) AND LASTLY, I AM CONCERNED ABOUT RECURRING PROBLEMS RELATING TO THE EEOC'S ADMINISTRATIVE ENFORCEMENT PRACTICES UNDER HIS CHAIRMANSHIP.

WHILE I WILL BRIEFLY ADDRESS THESE ISSUES, I REFER YOU TO THE REPORT OF MY COMMITTEE STAFF ENTITLED, "INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION". (MAY 1986) THIS REPORT WAS BASED ON VISITS TO SIX EEOC DISTRICT OFFICES, WHICH MY STAFF CONDUCTED LAST FALL. I BELIEVE THAT THE FINDINGS INDICATED IN THIS REPORT WILL BE VERY ILLUMINATING, AND WILL GIVE YOU AN EXCELLENT SENSE OF THE BASIS OF MY CONCERNS AND THE PROBLEMS CURRENTLY FACING THIS AGENCY. I ASK THAT THIS STAFF REPORT, AS WELL AS MY WRITTEN TESTIMONY, BE INCLUDED IN THE OFFICIAL RECORD OF THIS HEARING.

I. POLICY ISSUES

GOALS AND TIMETABLES

WHEN MY COMMITTEE STAFF CONDUCTED VISITS AT EEOC DISTRICT OFFICES LAST FALL, THEY LEARNED THAT THE COMMISSION'S ACTING GENERAL COUNSEL ORALLY DIRECTED THE COMMISSION'S REGIONAL ATTORNEYS THAT THEY WERE NOT TO RECOMMEND THE USE OF GOALS AND TIMETABLES IN CONSENT DECREES OR TO INTERVENE IN CASES IN WHICH GOALS AND TIMETABLES ARE PROPOSED AS A REMEDY FOR EMPLOYMENT DISCRIMINATION. COMMITTEE STAFF LATER DISCOVERED THAT THE ACTING GENERAL COUNSEL ALSO HAD INSTRUCTED THE LEGAL STAFF NOT TO SEEK THE ENFORCEMENT OF GOALS AND TIMETABLES IN EXISTING CONSENT DECREES AS WELL AS IN FUTURE ONES. THIS INFORMATION WAS LATER CONFIRMED BY MR. JOHNNY J. BUTLER, THE ACTING GENERAL COUNSEL, AT A HEARING BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES IN MARCH OF THIS YEAR.

NOT ONLY WAS THE COMMISSION'S LEGAL STAFF THOROUGHLY CONVINCED THAT THE COMMISSION OPPOSED THE USE OF GOALS AND TIMETABLES, THE EEOC COMPLIANCE STAFF, WHICH CONDUCTS INVESTIGATIONS OF COMPLAINTS OF DISCRIMINATION, ALSO MADE IT CLEAR THAT "GOALS AND TIMETABLES WERE DEAD". WHILE THE SUPREME COURT HAD GRANTED CERTIORARI IN WYGANT V. JACKSON BOARD OF EDUCATION, LOCAL 28 V. EEOC, AND LOCAL 93 V. CITY OF CLEVELAND, TO REVIEW THE VALIDITY OF AFFIRMATIVE RELIEF, THE LAW APPLICABLE AT THE TIME OF THE GENERAL COUNSEL'S DIRECTIVE CLEARLY PERMITTED THE USE OF SUCH REMEDIES AND IT HAD LONG BEEN THE PRACTICE OF THE

COMMISSION TO SEEK SUCH RELIEF.

WHAT IS MOST TROUBLING, MR. CHAIRMAN, IS THAT IF MY COMMITTEE STAFF HAD NOT CONDUCTED ITS INVESTIGATION LAST FALL, NONE OF THIS INFORMATION REGARDING A MAJOR CHANGE IN EEO ENFORCEMENT POLICY WOULD HAVE BEEN BROUGHT TO LIGHT. WHAT IS EVEN MORE TROUBLING IS THE FACT THAT CHAIRMAN CLARENCE THOMAS, IN HIS REPLY TO A LETTER SENT TO HIM BY FIVE MEMBERS OF CONGRESS, INCLUDING MYSELF, EFFECTIVELY CONDONED MR. BUTLER'S ACTIONS. IN HIS LETTER, CHAIRMAN THOMAS WROTE:

> PLEASE BE ADVISED THAT THE STATEMENT (OF THE ACTING GENERAL COUNSEL) WAS MADE PURSUANT TO THE ACTING GENERAL COUNSEL'S AUTHORITY TO CONDUCT LITIGATION ON BEHALF OF THE COMMISSION...AND HIS INTERPRETATION OF THE GENERAL DIRECTION OF COMMISSION POLICY.

COMMITTEE STAFF LATER DISCOVERED THAT IN KEEPING WITH THIS UNANNOUNCED POLICY CHANGE, THE EEOC HAD EARLIER SIGNED A CONSENT DECREE IN THE CASE OF MEYER V. MACMILLAN PUBLISHING COMPANY, WHICH CONTAINED THE FOLLOWING LANGUAGE: "THE EEOC TAKES NO POSITION WITH REGARD TO SECTION VII OF THIS DECREE PERTAINING TO GOALS, AND WILL NOT PARTICIPATE IN ITS ENFORCEMENT". THIS LANGUAGE WAS ADDED TO THE CONSENT DECREE OVER THE OBJECTIONS OF BOTH THE PLAINTIFFS AND DEFENDANTS IN THIS CASE.

CLEARLY, CONGRESS DID NOT CONFER THE POLICY-MAKING FUNCTIONS OF THE COMMISSION UPON THE GENERAL COUNSEL. NOR DID IT INTEND FOR THE CHAIR OF THE COMMISSION TO USE THE OFFICE OF THE GENERAL COUNSEL AND ITS "PROSECUTORIAL AUTHORITY" AS A PRETEXT FOR POLICY-MAKING THAT HE OR SHE FINDS POLITICALLY UNPALATABLE. IF CHAIRMAN THOMAS HAD SERIOUS PROBLEMS WITH THE USE OF GOALS AND TIMETABLES TO REMEDY THE EFFECTS OF DISCRIMINATION, HE SHOULD HAVE PRESENTED HIS CONCERNS TO THE COMMISSION WHICH, IN TURN, COULD HAVE VOTED TO MODIFY ITS AFFIRMATIVE ACTION GUIDELINES AND THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES. AS THINGS STAND TODAY, CHAIRMAN THOMAS HAS LEFT HIS STAFF, EMPLOYERS AND POTENTIAL CHARGING PARTIES IN A STATE OF CONFUSION.

WHILE WE HAVE SOUGHT CLARIFICATION REGARDING HIS COMMITMENT TO USE ALL OF THE ENFORCEMENT TOOLS AT HIS DISPOSAL, IT REMAINS UNCLEAR WHETHER CHAIRMAN THOMAS HAS FULLY ACCEPTED THE SUPREME COURT'S MOST RECENT PRONOUNCEMENTS IN WYGANT V. JACKSON SCHOOL BOARD, LOCAL 28 V. EEOC (A CASE IN WHICH THE EEOC CHANGED ITS POSITION WHICH WAS, INITIALLY, IN FAVOR OF GOALS AND TIMETABLES), AND LOCAL 93 V. CITY OF CLEVELAND. I REMAIN CONCERNED THAT IF CLARENCE THOMAS IS CONFIRMED BY THIS BODY, MY COMMITTEE WILL BE FORCED TO CONDUCT EVEN MORE VIGOROUS OVERSIGHT TO ENSURE THAT THE LAW AS INTERPRETED BY THE COURTS WILL BE ENFORCED. WHAT IS STATED IN EEOC GUIDELINES AND TESTIMONIES AS POLICY MAY NOT BE WHAT IS ACTUALLY IMPOSED UPON THE EEOC STAFF AND THE PUBLIC.

THE ASSURANCES GIVEN DURING THOMAS' LAST CONFIRMATION HEARING AND HIS SUBSEQUENT ACTIONS SUPPORT THE ARGUMENT THAT WHAT CHAIRMAN THOMAS TESTFIFIES TO BE HIS POLICY MAY NOT BE REFLECTED IN SUBSEQUENT ENFORCEMENT ACTIONS. IN 1982 CHAIRMAN THOMAS ASSURED THE MEMBERS OF THIS COMMITTEE, IN HIS FIRST CONFIRMATION HEARING, THAT GOALS AND TIMETABLES "ARE NECESSARY IN MONITORING SOME SORT OF PROGRESS IN CERTAIN AREAS". LATER, WHEN TESTIFYING BEFORE MY SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES IN 1984, HE STATED THAT,

> I DO NOT SUPPORT THE USE OF GOALS AND TIMETABLES. I DO NOT THINK, AS A PRACTICAL MATTER, THAT THEY WORK, NOR DO I BELIEVE THAT WE CAN IN ANY WAY DETERMINE WHAT IS THE PERFECT WORK FORCE REPRESENTATION FOR ANY GROUP AT ANY TIME. *

IN 1985, CHAIRMAN THOMAS REMOVED ALL DOUBT AS TO HIS VIEWS ON THE USE OF GOALS AND TIMETABLES WHEN HE WROTE IN THE EEOC'S SUBMISSION TO THE REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT:

> THE FEDERAL ENFORCEMENT AGENCIES, INCLUDING THE EEOC AND THE DEPARTMENTS OF JUSTICE AND LABOR, TURNED THE STATUTES ON THEIR HEADS BY REQUIRING DISCRIMINATION IN THE FORM OF HIRING AND PROMOTION QUOTAS, SO-CALLED GOALS AND TIMETABLES, ...AS CHAIRMAN OF THE EEOC, I HOPE TO REVERSE THIS FUNDAMENTALLY FLAWED APPROACH TO

* Oversight Hearing on the EEOC's Enforcement Policies: Hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, 98th Cong., 2d Sess (1984)(p.9)

ENFORCEMENT OF THE ANTI-DISCRIMINATION STATUTES.

I WOULD URGE YOU TO NOTE THAT MR. THOMAS' CONFIDENT REJECTION OF THESE ENFORCEMENT TOOLS STANDS IN STARK CONTRAST WITH THE REASONING IN RECENT SUPREME COURT DECISIONS WHICH ACKNOWLEDGE NOT ONLY THE LAWFULNESS OF GOALS AND TIMETABLES, BUT THEIR PRACTICAL NECESSITY IN APPROPRIATE CIRCUMSTANCES.

THE CONTRAST BETWEEN THE VIEWS GIVEN BY CHAIRMAN THOMAS AT HIS FIRST CONFIRMATION HEARING AND HIS 1985 SUBMISSION TO THE REGULATORY PROGRAM LEADS US TO ASK THE FOLLOWING QUESTION: HAS CLARENCE THOMAS SIMPLY CHANGED HIS POSITION REGARDING GOALS AND TIMETABLES SINCE HIS FIRST CONFIRMATION HEARING, OR DID HE MISLEAD THIS BODY AS TO HIS TRUE OPINIONS CONCERNING THE USE OF SUCH AFFIRMATIVE ACTION REMEDIES? MORE IMPORTANTLY, GIVEN HIS STRONG VIEWS ON THE SUBJECT, IS HE TRULY WILLING TO USE EVERY LAWFUL TOOL AVAILABLE TO THE COMMISSION TO ERADICATE EMPLOYMENT DISCRIMINATION AND TO DEFEND THOSE VICTIMS OF DISCRIMINATION WHOM CONGRESS INTENDED TO PROTECT? WILL HE BE ABLE TO ENFORCE THE LAW AS INTERPRETED BY THE SUPREME COURT IN ITS MOST RECENT DECISIONS CONCERNING GOALS AND TIMETABLES? AFTER CAREFUL REFLECTION, I CAN ONLY CONCLUDE THAT THE ANSWER TO THESE QUESTIONS MAY WELL BE "NO".

I AM PARTICULARLY CONCERNED ABOUT THE COMMISSION'S SYSTEMIC ENFORCEMENT PROGRAM UNDER CLARENCE THOMAS' LEADERSHIP. IF EEOC STAFF IS PROHIBITED FROM OR EVEN LIMITED IN USING STATISTICS TO

ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION IN CASES INVOLVING LARGE CLASSES OF PLAINTIFFS, AND IF, AS WE UNDERSTAND IT, STAFF MUST PAINSTAKINGLY IDENTIFY ALL POTENTIAL VICTIMS OF DISCRIMINATION IN THE CONDUCT OF CLASS LITIGATION, THE RESULT OF THIS POLICY WILL BE TO UNDERMINE THE SYSTEMIC ENFORCEMENT PROGRAM. MOREOVER, IF REMEDIES ARE ALSO LIMITED TO "IDENTIFIED VICTIMS", THE EFFECT OF THIS ENFORCEMENT POSTURE WILL BE TO PRECLUDE MANY, IF NOT MOST, DISCRIMINATEES FROM OBTAINING ANY RELIEF, PARTICULARLY WHEN, AFTER YEARS OF LITIGATION, IT IS IMPOSSIBLE TO IDENTIFY ALL OF THE INDIVIDUALS WHO WOULD HAVE BEEN HIRED OR PROMOTED IN THE ABSENCE OF LAWFUL DISCRIMINATION.

A RECENT REPORT BY WOMEN EMPLOYED INSTITUTE, A CHICAGO-BASED WOMEN'S ADVOCACY ORGANIZATION WHICH MONITORS THE EEOC, UNDERSCORES THE CONCERNS WHICH WE HAVE REGARDING THIS APPARENT "VICTIMS ONLY" POLICY. THIS REPORT FOUND THAT IN THE FIRST HALF OF 1985, ONLY 2,964 VICTIMS OF DISCRIMINATION RECEIVED MONETARY BENEFITS THROUGH CHARGES FILED WITH THE AGENCY. IN 1980, 15,328 PERSONS RECEIVED SUCH BENEFITS.

WHETHER THE EEOC WILL CHANGE ITS "IDENTIFIED VICTIMS" POLICY IN LIGHT OF THE RECENT SUPREME COURT DECISIONS IN WYGANT, LOCAL 28 v. EEOC AND LOCAL 93 v. CITY OF CLEVELAND IS UNCLEAR. CHAIRMAN THOMAS HAS GIVEN HIS ASSURANCE IN A LETTER TO ME THAT HE WOULD FOLLOW SUPREME COURT CASE LAW ON THIS MATTER. HE ALSO ADMITTED THAT THE THREE SUPREME COURT CASES CLARIFIED THAT "NUMERICAL GOALS AND OTHER RACE-CONSCIOUS TECHNIQUES ARE LEGALLY

AVAILABLE TO AID IN SEEKING RELIEF IN PATTERN AND PRACTICE DISCRIMINATION CASES, AND THAT SUCH RELIEF NEED NOT BE LIMITED SO AS TO BENEFIT ONLY IDENTIFIED VICTIMS OF DISCRIMINATION." WHETHER HE WILL TAKE THE ADDITIONAL STEP OF IMPLEMENTING THESE ASSURANCES BY INFORMING HIS STAFF OF HIS VIEWS, OR WHETHER HE WILL READ THESE CASES SO NARROWLY AS TO EVISCERATE THEIR MEANING, ARE ISSUES WHICH THIS PANEL MUST SERIOUSLY CONSIDER WHEN IT DECIDES WHETHER OR NOT TO CONFIRM MR. THOMAS.

THOMAS' REPUDIATION OF THE ADVERSE IMPACT THEORY AND THE USE OF STATISTICS

IN ADDITION TO THOMAS' REPUDIATION OF THE USE OF GOALS AND TIMETABLES AS A REMEDY FOR IMPERMISSIBLE EMPLOYMENT DISCRIMINATION, WE HAVE LEARNED FROM EEOC STAFF AND FROM PUBLISHED REPORTS THAT CHAIRMAN THOMAS HAS RENOUNCED THE ADVERSE IMPACT THEORY AND THE USE OF STATISTICS, AS CONDONED BY THE SUPREME COURT IN GRIGGS V. DUKE POWER AND IN LATER DECISIONS. IN THE EEOC'S 1985 SUBMISSION TO THE ADMINISTRATION'S REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, THOMAS ARGUES: "THE EEOC...TURNED THE STATUTES ON THEIR HEADS BY USING RIGID STATISTICAL RULES TO DEFINE DISCRIMINATION...." THOMAS WENT ON TO SAY:

> THE PREMISE UNDERLYING UGESP (THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCDURES) IS THAT BUT FOR UNLAWFUL DISCRIMINATION BY AN EMPLOYER, THERE WOULD

> NOT BE VARIATIONS IN THE RATES OF HIRE OR PROMOTION OF PEOPLE OF DIFFERENT RACES, SEXES, OR NATIONAL ORIGINS WHO ARE HIRED OR PROMOTED BY THAT EMPLOYER.... UGESP ALSO SEEMS TO ASSUME SOME INHERENT INFERIORITY OF BLACKS, HISPANICS, OTHER MINORITIES, AND WOMEN BY SUGGESTING THAT THEY SHOULD NOT BE HELD TO THE SAME STANDARD AS OTHER PEOPLE EVEN IF THOSE STANDARDS ARE RACE- AND SEX-NEUTRAL. OPERATING FROM THESE PREMISES, UGESP MAKES DETERMINATIONS OF DISCRIMINATION ON THE BASIS OF A MECHANICAL STATISTICAL RULE THAT HAS NO RELATIONSHIP TO THE PLAIN MEANING OF THE TERM 'DISCRIMINATION'.

AS YOU KNOW, UNDER THE ADVERSE IMPACT THEORY, EMPLOYERS' NEUTRAL HIRING AND PROMOTION REQUIREMENTS, SUCH AS APTITUDE TESTS, WHICH HAVE AN ADVERSE IMPACT ON WOMEN AND MINORITIES, ARE PRESUMED TO BE DISCRIMINATORY UNLESS JUSTIFIED BY BUSINESS NECESSITY. THIS STANDARD OF PROOF IS USED IN CLASS ACTION CASES AND HAS BEEN EFFECTIVE IN COMBATTING PERVASIVE EMPLOYMENT DISCRIMINATION. NOW, WHEN CLASS ACTION CASES ARE REFERRED TO HEADQUARTERS FOR LITIGATION APPROVAL, EEOC LAWYERS MUST ARTICULATE OTHER THEORIES TO PROVE DISCRIMINATION, SUCH AS "THE DISPROPORTIONATE EXCLUSION THEORY", OR THEIR CASES WILL BE REJECTED. WHAT THIS STANDARD MEANS, THE ATTORNEYS COULD NOT EXPLAIN, NOR CAN WE.

MOREOVER, THIS NEW STANDARD HAS APPARENTLY BEEN IMPOSED UPON

THE EEOC FIELD STAFF AND ATTORNEYS BY ORAL FIAT. NOTHING, TO OUR KNOWLEDGE, HAS BEEN PUT IN WRITING TO GIVE THE STAFF AND THE PUBLIC CLEAR DIRECTION AS TO THE CHAIRMAN'S OR THE COMMISSION'S REVISED POSITION ON THE SUBJECT OF ADVERSE IMPACT AND THE USE OF STATISTICS.

IN KEEPING WITH MR. THOMAS' APPARENT VIEWS ON THE ADVERSE IMPACT THEORY, CHAIRMAN THOMAS WROTE IN 1984 THAT HE WOULD PROPOSE TO THE COMMISSION AND TO THE AGENCIES WHICH CO-SIGNED THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (THE CIVIL SERVICE COMMISSION AND THE DEPARTMENTS OF LABOR, THE TREASURY AND JUSTICE) A REVISION OF THE GUIDELINES THAT "WILL RECOGNIZE THAT STATISTICAL DISPARITIES ARE NOT TANTAMOUNT TO DISCRIMINATION AND THAT MINORITIES AND WOMEN ARE FULLY CAPABLE OF COMPETING ON THE BASES OF RACE- AND SEX-NEUTRAL STANDARDS".

THUS, I FOUND IT TROUBLING THAT WHEN I RECENTLY SOUGHT MR. THOMAS' CONCURRENCE THAT STATISTICS WERE LEGALLY PERMISSIBLE AS A TRIGGER TO ESTABLISH THE EXISTENCE OF CLASS-BASED DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, MR. THOMAS RESPONDED ON JULY 15, 1986 BY REITERATING HIS 1984 TESTIMONY GIVEN BEFORE THE HOUSE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES:

> THERE IS NO QUESTION THAT A PLAINTIFF IN A TITLE VII ACTION MAY ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION SOLELY THROUGH THE USE OF STATISTICS PROVIDED THAT THE STATISTICAL METHODOLOGY AND

> ANALYSIS ARE SUCH THAT THE EVIDENCE IS RELEVANT AND PROBATIVE.

HE SUBSEQUENTLY CONCLUDED THAT:

> STATISTICS OFFER ALL LITIGANTS IN EMPLOYMENT DISCRIMINATION CASES A VARIETY OF ANALYTICAL APPROACHES FOR PRESENTING AND REBUTTING ARGUMENTS. FURTHER, STATISTICS PROVIDE THE COURTS THE NECESSARY TOOLS TO BASE DECISIONS ON INFERENCES FROM DATA RATHER THAN FROM INTUITION. STATISTICAL THEORY PROVIDE [SIC] A LOGIC THROUGH WHICH RISKS OF ERROR ASSOCIATED WITH INFERENCES CAN BE QUANTIFIED.

THUS, WHILE HE HAS CONSISTENTLY ARTICULATED STRONG RESERVATIONS REGARDING THE USE OF STATISTICS AND OTHER NUMERICAL FORMULATIONS, ON THE EVE OF HIS PROPOSED CONFIRMATION, HE IS ABLE TO DRAFT AN UNEQUIVOCAL ENDORSEMENT OF THE USE OF STATISTICS. SUCH SHIFTING OF STATED POSITIONS NECESSARILY IS OF CONCERN TO ME AND I WOULD URGE, SHOULD BE OF CONCERN TO YOU, PARTICULARLY GIVEN THE EXAMPLES OF SUCH EQUIVOCATIONS WHICH I HAVE JUST DESCRIBED.

CHAIRMAN THOMAS HAS BEEN SEVERELY CRITICIZED FOR CONDUCTING THE REVIEW OF THE UNIFORM GUIDELINES IN SECRECY, AND OUR SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES HAS HELD HEARINGS IN AN ATTEMPT TO ASCERTAIN WHAT REVISIONS CHAIRMAN THOMAS INTENDS TO RECOMMEND. THE SECRECY SURROUNDING THIS REVIEW DIFFERS MARKEDLY

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FROM THE PRACTICES OF PREVIOUS ADMINISTRATIONS UNDER WHICH UGESP REVIEW WAS CONDUCTED OPENLY AND WITH THE INVOLVEMENT OF SEVERAL AGENCIES WHICH PUBLICIZED THEIR DRAFTS AND PERMITTED THE PUBLIC, INCLUDING EMPLOYERS, THE PSYCHOLOGICAL PROFESSION AND CIVIL RIGHTS GROUPS TO COMMENT ON SEVERAL OCCASIONS AND TO MAKE RECOMMENDATIONS FOR THE IMPROVEMENT OF THE GUIDELINES.

I URGE YOU TO ASCERTAIN MR. THOMAS' TRUE POSITION ON THESE IMPORTANT POLICY MATTERS, AND TO ESTABLISH CLEARLY THAT, IF CONFIRMED, HE WILL INDEED ENFORCE THE LAW AS SET FORTH BY THE CONGRESS AND INTERPRETED BY THE COURTS. MOREOVER, IT IS IMPORTANT THAT MR. THOMAS COMMIT TO CONDUCTING THE BUSINESS AND POLICY-MAKING OF THE COMMISSION OPENLY, TO PROVIDE THE CONGRESS AND INTERESTED MEMBERS OF THE PUBLIC WITH A TIMELY OPPORTUNITY FOR COMMENT, CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE SUNSHINE ACT.

II. ADMINISTRATIVE ENFORCEMENT ISSUES

FEDERAL AFFIRMATIVE ACTION PROGRAM

THE CONCEPT OF AFFIRMATIVE ACTION FOR EMPLOYEES OF THE FEDERAL GOVERNMENT DATES BACK TO 1940 WHEN PRESIDENT ROOSEVELT ISSUED EXECUTIVE ORDER 8587 WHICH MANDATED THAT PUBLIC EMPLOYMENT SHOULD NOT BE DENIED FOR REASONS OF RACE, CREED OR COLOR. REPUBLICAN PRESIDENT EISENHOWER, ATTEMPTING TO MOVE THE PROGRESS OF MINORITIES A STEP FURTHER, ISSUED EXECUTIVE ORDER 10950 WHICH

PROCLAIMED THAT: "IT IS THE POLICY OF THE U.S. GOVERNMENT THAT EQUAL OPPORTUNITY BE AFFORDED ALL QUALIFIED PERSONS, CONSISTENT WITH LAW, FOR EMPLOYMENT IN THE FEDERAL GOVERNMENT". FEDERAL AFFIRMATIVE ACTION PROGRAMS TODAY ARE DESIGNED TO PROVIDE QUALIFIED MINORITIES AND WOMEN ACCESS TO FEDERAL JOBS AND TO MOVE INTO ADMINISTRATIVE AND PROFESSIONAL POSITIONS BASED ON THEIR MERITS AND WITHOUT REGARD TO THEIR RACE, SEX OR NATIONAL ORIGIN.

IN THE AUGUST 8, 1985 TRANSMITTAL OF THE AGENCY'S REGULATORY PROGRAM AGENDA TO THE OFFICE OF MANAGEMENT AND BUDGET, MR. THOMAS INDICATED THAT IT WAS NECESSARY TO REVISE MANAGEMENT DIRECTIVE 707 WHICH PROVIDES GUIDANCE TO FEDERAL AGENCIES IN THEIR COMPLIANCE WITH EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION REQUIREMENTS. MANAGEMENT DIRECTIVE 707, WHICH WAS ADOPTED BY THE EEOC IN 1981, REQUIRES FEDERAL AGENCIES TO SUBMIT AN ANNUAL AFFIRMATIVE ACTION PLAN CONTAINING: (1) A WORKFORCE UTILIZATION ANALYSIS WHICH SHOWS THE AGENCY'S WORKFORCE PROFILE AS WELL AS AN ASSESSMENT OF UNDERREPRESENTATION, UNDERUTILIZATION AND ADVERSE IMPACT BY THE AGENCY; (2) AN ANALYSIS OF BARRIERS TO EMPLOYMENT OPPORTUNITIES; AND (3) AFFIRMATIVE ACTION GOALS AND TIMETABLES DESIGNED TO ELIMINATE THE BARRIERS TO EMPLOYMENT OPPORTUNITIES AND TO ACHIEVE AN AFFIRMATIVE PROGRAM OF EQUAL EMPLOYMENT OPPORTUNITY WITHOUT REGARD TO ONE'S RACE, SEX OR NATIONAL ORIGIN.

ALTHOUGH THE COMMISSION HAS VOTED TO EXTEND ITS AUTHORITY TO COLLECT FEDERAL AFFIRMATIVE ACTION PLANS UNDER MANAGEMENT DIRECTIVE 707 FOR ANOTHER FISCAL YEAR, I UNDERSTAND THAT MR. THOMAS CONTINUES TO SUGGEST THAT THE DIRECTIVE SHOULD BE REVISED TO DELETE THE REQUIREMENT THAT FEDERAL AGENCIES SHOULD SET HIRING GOALS AND TIMETABLES.

ON MAY 7, 1986, THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS NOTIFIED THE DIRECTOR OF THE NATIONAL INSTITUTES OF HEALTH TO AVOID THE USE OF NUMERICAL GOALS AND TIMETABLES IN THEIR ANNUAL AFFIRMATIVE ACTION PROGRAMS. CLEARLY, THIS IS INCONSISTENT WITH MANAGEMENT DIRECTIVE 707 AND IS A DIRECT INTRUSION UPON EEOC'S ENFORCEMENT AUTHORITY IN THE FEDERAL SECTOR. I MUST POINT OUT THAT THE JUSTICE DEPARTMENT IS ONE OF A FEW FEDERAL AGENCIES WHICH, OVER THE LAST FEW YEARS, HAS FAILED TO COMPLY WITH THE REQUIREMENT TO SUBMIT AFFIRMATIVE ACTION PLANS CONTAINING GOALS AND TIMETABLES.

MY COMMITTEE CONDUCTED A HEARING ON JULY 15, 1986 FOCUSING ON PROPOSED LEGISLATION, H.R. 5165, TO PROVIDE THE EEOC WITH INCREASED ENFORCEMENT POWERS TO COLLECT THESE AFFIRMATIVE ACTION PLANS. MR. THOMAS WAS INVITED BUT DECLINED TO TESTIFY ON THAT PROPOSED LEGISLATION.

QUALITY INVESTIGATIONS BY THE EEOC

MR. THOMAS, AS CHAIRMAN OF THE EEOC, HAS STATED ON NUMEROUS OCCASIONS THAT THE COMMISSION HAS A POLICY OF CONDUCTING FULL INVESTIGATIONS AND FINDINGS ON THE MERITS. HOWEVER, MY COMMITTEE HAS BEEN MADE AWARE OF MANY INSTANCES IN WHICH INADEQUATE INVESTIGATIONS WERE OR ARE BEING CONDUCTED BY EEOC STAFF.

AN OCTOBER 1985 INTERNAL AUDIT MEMO REGARDING THE MANAGEMENT OF CASE PROCESSING IN THE CHICAGO DISTRICT OFFICE OF THE EEOC REVEALED THAT, "...CASES OFTEN APPEAR IMPROPERLY CONCLUDED OR WRITTEN UP LARGELY ON THE STATEMENTS OF RESPONDENTS". THE AUDIT REPORT MEMO FURTHER STATED THAT, "...WITNESSES WERE NOT CONTACTED AND POSSIBLE CLASS-BASED ALLEGATIONS WERE NOT INVESTIGATED".

A FEBRUARY 1986 REPORT BY WOMEN EMPLOYED INSTITUTE, AN ADVOCACY GROUP WHICH PROMOTES EDUCATIONAL, EMPLOYMENT AND ECONOMIC OPPORTUNITIES FOR WOMEN, CORROBORATES THE INFORMATION RECEIVED ABOUT INADEQUATE INVESTIGATIONS BY THE EEOC. ACCORDING TO WOMEN EMPLOYED, "...CHARGES ARE BEING DETERMINED 'NO CAUSE' INDISCRIMINATELY BECAUSE OF A LACK OF TRAINING ON THE PART OF THE INTAKE AND INVESTIGATIVE STAFF, A LACK OF RESOURCES TO COMPLETE ADEQUATE INVESTIGATIONS, AND MANAGEMENT'S EMPHASIS ON CLOSING FILES RATHER THAN QUALITY INTAKE AND INVESTIGATION". AS A RESULT, MANY POTENTIALLY MERITORIOUS CHARGES ARE THROWN OUT DUE TO INADEQUATE INVESTIGATIONS.

IN ADDITION, EEOC INVESTIGATORS IN THE BIRMINGHAM DISTRICT OFFICE AND THE MEMPHIS DISTRICT OFFICE HAVE NOTIFIED MY COMMITTEE THAT THEY ARE BEING PRESSURED AND HAVE, IN FACT, BEEN INSTRUCTED BY THEIR SUPERVISORS TO CLOSE HUNDREDS OF CHARGES WITH MINIMALLY ADEQUATE EVIDENCE AND WITHOUT AN OPPORTUNITY FOR A THOROUGH INVESTIGATION. THE GENERAL ACCOUNTING OFFICE IS CURRENTLY INVESTIGATING THESE ALLEGATIONS AT THE BIRMINGHAM DISTRICT OFFICE.

THE COMMISSION HAS THE STATUTORY RESPONSIBILITY TO CHARGING PARTIES TO CONDUCT FULL INVESTIGATIONS OF ALL CHARGES. AS CHAIRMAN OF THE EEOC, MR. THOMAS HAS THE RESPONSIBILITY TO ENSURE THAT THE QUALITY OF INVESTIGATIONS IS NOT SACRIFICED IN ORDER TO INFLATE CASE PROCESSING STATISTICS. CHAIRMAN THOMAS SHOULD ISSUE A DIRECTIVE TO ALL COMMISSION STAFF THAT THE CHARGES IN INVESTIGATION SHOULD NOT BE PREMATURELY CLOSED AND THAT THE RIGHTS OF BOTH CHARGING PARTIES AND RESPONDENTS SHOULD BE CAREFULLY AND JUDICIOUSLY RESPECTED BY THE COMMISSION.

DOWNGRADING OF EEOC'S INTAKE UNITS

THE EQUAL OPPORTUNITY SPECIALISTS IN THE INTAKE UNITS OF THE COMMISSION'S FIELD OFFICES ARE THE FIRST PERSONS WHICH THE PUBLIC ENCOUNTERS AT THE EEOC. THE INTAKE STAFF ARE RESPONSIBLE FOR OBTAINING THE INITIAL INFORMATION FROM THE CHARGING PARTIES, ADVISING THEM OF THEIR RIGHTS UNDER LAW AND MAKING THE INITIAL JUDGMENTS AS TO THE MERITS OF THE CHARGES.

ALTHOUGH THE INTAKE UNITS' RESPONSIBILITIES REQUIRE SEASONED, KNOWLEDGABLE PERSONNEL, AN AGENCY-WIDE REORGANIZATION IN 1984 ESSENTIALLY DOWNGRADED THE STAFF OF THESE UNITS TO GS-9, GS-7 AND GS-5 LEVELS. THE EFFECT OF THE DOWNGRADING HAS BEEN TO STAFF THESE UNITS WITH PERSONS WITH LESS EXPERIENCE AND WITH LITTLE OR NO TRAINING TO PERFORM THIS ESSENTIAL FUNCTION. MY COMMITTEE HAS BEEN INFORMED THAT THE QUALITY OF THE WORK PRODUCT GENERATED BY THE INTAKE UNITS OF THE EEOC HAS DECLINED AND THAT INTAKE STAFF ARE IN DIRE NEED OF TRAINING ON DISCRIMINATION LAW AND INVESTIGATIVE TECHNIQUES.

TRAINING OF EEOC STAFF

THE AMOUNT OF FORMALIZED TRAINING PROVIDED TO THE COMMISSION'S EQUAL OPPORTUNITY SPECIALISTS IS SEVERELY LIMITED AND CONSISTS OF A MELANGE OF AD HOC PROGRAMS WHICH VARY IN LENGTH AND QUALITY, DEPENDING UPON THE PRIORITIES OF THE DISTRICT OFFICES INVOLVED.

MY COMMITTEE STAFF VISITED SIX DISTRICT OFFICES OF THE COMMISSION LAST FALL AND TALKED TO DOZENS OF INVESTIGATORS, ATTORNEYS AND INTAKE OFFICERS TO DETERMINE WHAT TYPES OF TRAINING ARE AVAILABLE TO THEM. IN GENERAL, THE MAJORITY OF THE STAFF INDICATED THAT THE COMMISSION'S NON-SUPERVISORY TRAINING PROGRAM CONSISTS OF ON-THE-JOB TRAINING AND VERY LITTLE CLASSROOM TRAINING. THIS IS PARTICULARLY TRUE FOR NEW STAFF IN THE INTAKE UNITS. TRAINING FOR INVESTIGATORS AND OTHER EQUAL OPPORTUNITY

SPECIALISTS, IN ORDER TO KEEP THEM ABREAST OF THE LAW AND TODAY'S SOPHISTICATED EMPLOYMENT SYSTEMS, IS VIRTUALLY NON-EXISTENT.

ALLOCATION OF COMMISSION RESOURCES

IN FISCAL YEAR 1986, THE EEOC WAS APPROPRIATED $165 MILLION AND WAS AUTHORIZED APPROXIMATELY 3,000 FULL-TIME EQUIVALENT STAFF IN ORDER TO CARRY OUT ITS RESPONSIBILITY TO RECEIVE, INVESTIGATE, ATTEMPT TO RESOLVE, AND LITIGATE CHARGES AND COMPLAINTS OF EMPLOYMENT DISCRIMINATION.

THERE HAS BEEN CRITICISM ABOUT THE LARGE NUMBER OF STAFF AT THE COMMISSION'S HEADQUARTERS WHO ARE NOT DIRECTLY ASSIGNED TO THE INVESTIGATION OR LITIGATION OF CHARGES, THE PRIMARY ROLE OF THE AGENCY. FOR EXAMPLE, THE OFFICE OF MANAGEMENT AT HEADQUARTERS HAS MANY INDIVIDUALS WHOSE JOBS ARE DUPLICATIVE OF THE ADMINISTRATIVE RESPONSIBILITIES OF DISTRICT OFFICE STAFF.

THE COMMISSION, UNDER MR. THOMAS' LEADERSHIP, HAS ENGAGED IN NEW PROGRAM INITIATIVES SUCH AS THE VOLUNTARY ASSISTANCE PROGRAM AND THE EXPANDED PRESENCE PROGRAM, WHICH ADMITTEDLY PROVIDE EDUCATIONAL PROGRAMS TO EMPLOYERS AND OUTREACH SERVICES TO THE PUBLIC, BUT WHICH ARE OF QUESTIONABLE VALUE GIVEN THE AGENCY'S HUGE INVENTORY OF CHARGES AND THE LIMITED RESOURCES NECESSARY FOR INVESTIGATION AND LITIGATION ACTIVITIES. LAST YEAR, FOR EXAMPLE, THE COMMISSION MISCALCULATED ITS ESTIMATE OF LITIGATION SUPPORT ACTIVITIES IN A MAJOR SYSTEMIC CASE AND THREATENED FURLOUGHS OF

ITS EMPLOYEES TO PAY FOR NECESSARY LITIGATION EXPENSES. FORTUNATELY, THE EEOC FOUND EXTRA MONEY IN ITS BUDGET, BEFORE THE END OF THE FISCAL YEAR, TO PREVENT THE FURLOUGHS.

MORALE OF COMMISSION EMPLOYEES

DURING THE PAST FOUR YEARS OF MR. THOMAS' CHAIRMANSHIP OF THE EEOC, WITH ITS OFTEN CONFLICTING AND CONFUSING POLICIES AND PRACTICES, EMPLOYEE MORALE HAS BEEN AT AN ALL TIME LOW AND SOME EMPLOYEES ADMIT THAT THEY ARE "DEMORALIZED BEYOND REASON". COMMISSION EMPLOYEES WERE SADDENED TO LEARN, FOR EXAMPLE, FROM A FEBRUARY 28, 1986 WASHINGTON TIMES ARTICLE THAT CHAIRMAN THOMAS WAS ARMED WITH A COMPUTERIZED LISTING OF AGENCY EMPLOYEES WITH THE INTENTION OF PURGING THE EEOC OF "MALCONTENTS" AND INDIVIDUALS WHO SUFFER FROM A "LACK OF INTENSITY" ABOUT THE WORK OF THE AGENCY.

IN CONTRAST, MY COMMITTEE STAFF WERE IMPRESSED WITH THE APPARENT COMMITMENT OF THE EEOC STAFF TO THE MISSION OF THE AGENCY, DURING THEIR ON-SITE VISITS OF SELECTED DISTRICT OFFICES LAST FALL. EQUALLY IMPRESSIVE WAS THE AMOUNT OF ENERGY AND INITIATIVE WHICH COMMISSION STAFF GENERALLY DISPLAYED IN THEIR EFFORTS TO ENHANCE THE VARIOUS ENFORCEMENT PROGRAMS OF THE EEOC.

SUMMARY

IN CONCLUSION, I HAVE ATTEMPTED TO HIGHLIGHT MY MOST SERIOUS CONCERNS REGARDING THE EQUAL EMPLOYMENT OPPORTUNITY ENFORCEMENT POLICIES AND PRACTICES WHICH HAVE BEEN IMPLEMENTED UNDER CLARENCE THOMAS' LEADERSHIP. DURING MR. THOMAS' TENURE, HE HAS BEEN INCONSISTENT IN STATING WHAT HE WOULD OR WOULD NOT DO. HE HAS ATTEMPTED TO IMPLEMENT AN ADMINISTRATION POLICY WHICH DISREGARDED PRACTICAL NECESSITY, WHILE FLAUNTING LONGSTANDING LEGAL PRECEDENT; HE HAS BEEN LESS THAN CANDID ABOUT FUNDAMENTAL CHANGES IN EEOC ENFORCEMENT POLICY, FAILING TO PROPERLY ANNOUNCE THESE CHANGES TO THE CONGRESS AND TO THE PUBLIC; AND HE HAS SHOWN AN UNACCEPTABLE LACK OF CONCERN FOR THE STRONG ENFORCEMENT OF THE LAW. THE REPORTED MASSIVE CLOSURES OF EEOC CHARGES IN THE BIRMINGHAM DISTRICT OFFICE IS TESTIMONY TO THIS LACK OF CONCERN.

CHAIRMAN THOMAS HAS EFFECTIVELY IGNORED, IN MY VIEW, THE REPORT PREPARED BY THE STAFF OF MY COMMITTEE WHICH EXPOSED SERIOUS PROBLEMS WITH THE ADMINISTRATIVE ENFORCEMENT AND POLICY IMPLEMENTATION AT THE EEOC. THIS REPORT WAS MADE AVAILABLE TO THE EEOC IN MAY, YET WE HAVE NOT, TO DATE, RECEIVED ANY RESPONSE TO OR ACKNOWLEDGMENT OF THE COMMITTEE'S FINDINGS FROM THE COMMISSION. LASTLY, MR. THOMAS HAS SHOWN A SERIOUS INDIFFERENCE TO THE CONCERNS OF MY COMMITTEE, WHICH AS THE AUTHORIZING COMMITTEE, HAS THE RESPONSIBILITY FOR OVERSEEING THE OPERATIONS OF THE EEOC.

THUS, THE COMMISSION UNDER CHAIRMAN THOMAS' LEADERSHIP, HAS APPARENTLY LOST SIGHT OF THE FACT THAT ITS PRIMARY CONCERN IS TO PROTECT THE RIGHTS OF INDIVIDUALS WHO SEEK REDRESS UNDER THE FAIR EMPLOYMENT PRACTICES LAWS ENTRUSTED TO IT. IT IS THEY FOR WHOM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION WAS ESTABLISHED IN 1964 AND IT IS THEY FOR WHOM THE MISSION OF THE AGENCY MUST REMAIN OF PARAMOUNT IMPORTANCE.

HAVING SAID ALL OF THIS, EACH OF YOU SHOULD BE AWARE THAT THE CONFIRMATION OF CLARENCE THOMAS TO A SECOND TERM CREATES, IN MY VIEW, THE VERY REAL AND PRESENT DANGER THAT MANY OF THE ENFORCEMENT TOOLS WHICH HAVE EVOLVED OUT OF OUR CIVIL RIGHTS EXPERIENCES WILL BE UNACCEPTABLY MODIFIED OR OTHERWISE COMPROMISED BY MR. THOMAS' ATTEMPTS TO INFECT THEM WITH HIS PARTICULAR IDEOLOGICAL PERSPECTIVE. IF THIS OCCURS, IT WILL BE MY BURDEN AND EACH OF YOURS TO CONDUCT EVEN MORE VIGOROUS OVERSIGHT TO ASSURE THAT THE COMMISSION'S POLICIES AND PRACTICES COMPLY WITH THE MANDATE SET DOWN BY CONGRESS AND THE FEDERAL COURTS.

Women Employed
5 South Wabash
Suite 415
Chicago, Illinois 60603
(312) 782-3902

July 11, 1986

Honorable Augustus Hawkins
Committee on Education and Labor
2181 Rayburn Building
Washington, D.C. 20515

Dear Congressman Hawkins:

We are writing to express our strong opposition to the reappointment of Equal Employment Opportunity Commission (EEOC) Chairman Clarence Thomas.

Women Employed has monitored both the performance and policies of the EEOC for over 10 years. Under the Reagan administration, we have documented a deteriorating EEOC enforcement performance and analyzed policy changes which we believe run counter the agency's mandate to enforce equal employment opportunity laws. As Chairman of the Commission, Clarence Thomas must be held accountable for the current state of the agency. In particular, we are concerned because:

1. The number of complainants who received some type of settlement after filing a charge at the EEOC has declined drastically since the Reagan administration took office. In 1985, only 14.4 percent of all cases filed at the EEOC were settled. In 1980, 32.1 percent of all cases were settled. Litigation activity has fallen by 22 percent. In 1985, only 286 cases were filed in court by the EEOC.

2. Improvements in enforcement made during the Carter administration (strong emphasis on fair settlements and rapid resolution of charges) have been replaced by inaction, imcompetence, and hostility toward victims' rights to reasonable remedies.

3. More and more frequently, the EEOC's incompetence has forced complainants to hire attorneys to ensure that they are adequately represented and protected during the complaint process. Congress intended that the EEOC aid victims of discrimination in the resolution of their charges without requiring legal counsel. The current condition of the agency could effectively limit Title VII protection to those who can afford to pay for it.

4. The EEOC has created policies in the areas of litigation, remedial relief, and pay equity which are weakening overall enforcement and reducing the agency's future effectiveness.

(For a more complete explanation of the above concerns, please refer to our February, 1986 report entitled "Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration".)

5. Prior to this administration, we received comprehensive EEOC performance statistics on a quarterly basis. Since Clarence Thomas' appointment, we have continually had to challenge agency failure to release data under the Freedom of Information Act. Since the publication of our report in February, access to statistical performance data has been cut off completely. Access to the EEOC's performance data is vitally important if constitutency groups are to successfully monitor the agency.

6. EEOC commissioners have recently refused to authorize for litigation a number of Equal Pay Act suits. Their refusal seems to be based on an incorrect view that complainants in an Equal Pay Act suit must prove that the employer intended to discriminate. Since its passage in 1963, the Equal Pay Act has been interpreted by the Commission and the courts to impose strict liability in an unequal pay for equal work case regardless of good faith or reasonableness on the part of the employer. Such a misinterpretation of the Equal Pay Act by the current commissioners will severely limit the scope of the act.

As an organization of working women, we counsel women concerning every type of employment problem on a regular basis -- pregnancy discrimination, sexual harassment, equal pay problems, age discrimination, etc. Women and minorities continue to face serious discrimination, but it is our view that they can no longer depend on the EEOC to assist them in obtaining their right to equal opportunity in the workplace.

For these reasons, we strongly object to the reappointment of Clarence Thomas as Chairman of the EEOC.

Sincerely,

Anne Ladky

Anne Ladky
Executive Director

cc: Congressman Matthew Martinez
Congressman William Clay
Congressman Charles Hayes

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U.S. House of Representatives
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Washington, DC 20515-6216
Telephone: 202-225-3951

July 25, 1986

The Honorable Orrin Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express my serious concerns about the renomination of Clarence Thomas to serve as chairman of the Equal Employment Opportunity Commission.

My primary concern is that the EEOC, under Mr. Thomas' chairmanship, unilaterally abandoned the use of affirmative action remedies, including the use of numerical goals and timetables. I understand that Mr. Thomas told your Committee this week that he will now use goals and timetables, in accord with the Supreme Court's recent rulings in Wygant v. Jackson Board of Education, Sheet Metal Workers v. EEOC, and Firefighters v. Cleveland. I applaud his efforts to bring the EEOC's enforcement efforts in line with the law. But the policies and enforcement efforts of the EEOC during Mr. Thomas' first term were often without legal foundation, contrary to both case law and existing EEOC guidance. I am not sure what assurance Mr. Thomas can now give the Committee that his performance during a second term will be any different from his first.

It is my understanding that the EEOC, under the leadership of Mr. Thomas, also rejects the "adverse impact" theory, first articulated by the Supreme Court in Griggs v. Duke Power. Absent judicial repudiation of this theory, it is not within the power of Mr. Thomas to reject this theory. He has the obligation to fully enforce the laws, as passed by the Congress and interpreted by the courts.

I trust that the Committee will give full scrutiny to the record of Mr. Thomas, to insure that full and effective enforcement of our Nation's equal employment opportunity laws again be resumed.

I would appreciate this letter being made a part of the hearing record.

With kind regards.

Sincerely,

Don Edwards

Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights

DE:sid

cc: Members of the Committee
on Labor and Human Resources

CHARLES A. HAYES
1ST DISTRICT, ILLINOIS

COMMITTEES:
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House of Representatives
Washington, DC 20515

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July 29, 1986

The Honorable Orrin G. Hatch, Chairman
Committee on Labor & Human Resources
United States Senate
Senate Dirksen-428
Washington, D.C. 20510

Dear Chairman Hutch:

I would like to thank you for giving me this opportunity to express my strong opposition to the reappointment of Clarence Thomas as Chairman of the Equal Employment Opportuntity Commission (EEOC).

As a Membner ot the House Subcommittee on Employment Opportunities which has oversight jurisdiction over the EEOC, I have concerns about Mr. Thomas' past recod as EEOC Chairman, in the areas of the agency's policy decisions and personnel practices.

During the last several years Mr. Thomas has appeared before the Subcommittee many times and I find that Mr. Thomas, by his public statements, implementation of his restrictive EEO policies, selective enforcement of EEO Laws, public misstatements of discrimination laws and failure to vigorously enforce Title VII of the 1964 Civil Rights Act, as amended, has given employers a message that the federal enforcement of EEO is on hold. Mr. Thomas' record is overwhelming and clearly demonstrates that he is not suited to continue in the management and national enforcement of the federal EEO laws or other federal laws administered under authority of the EEOC Chairman.

Mr. Thomas does not have the endorsement of any major or national civil rights groups. Civil rights leaders and groups are opposed to Mr. Thomas' brand of non-enforcement of these vital laws. For example, the Chicago based Women Employed, which, among other things in the area of providing services to clients in the area of civil rights, has monitored both the prerformance and policies of the EEOC for over 10 years. Under the Reagan administration, they have documented a deteriorating EEOC enforcement preformance and analyzed policy changes which runs counter to the agency's mandate to enforce equal employment opportunity laws. Mr. Thomas must be held accountable for the the current state of the agency.

- The number of complaints who received some type of settlement after filing a charge at the EEOC has declined ddrastically since the Reagan administration took office. In 1985, only 14.4 percent of all cases filed at the EEOC were settled. In 1980, 32.1 percent of all cases were settled. Litigation activity has fallen by 22 percent. In 1985, only 286 ddiscrimination suits and 125 subpeona enforcement actions were filled in court by the EEOC. During the first three months of fiscal year 1986, the agency filed an additional 97 discrimination suits and 18 subpoena actions, a performance the agency termed as "record-breaking."[1]

• The EEOC commissioners have recently refused to authorize for litigation a number of Equal Pay Act suits. Their refusal seem to be based on an incorrect view that complaints in an Equal Pay Act suit must prove that the employer intended to discriminate. Since its passage in 1963, the Equal Pay Act has been interprerated by the Commission and the courts to impose strict liability in an unequal pay for equal work case regardless of good faith or reasonableness on the part of the employer. Such a misinterpretation of the Equal Pay Act by the current commissioners will severely limit the scope of the act.

• The EEOC abandoned the use of hiring goals and timetables in settlements with private employers accused or discrimination based on race and sex, without any vote of the Commisison or period of public comment on the proposed rule change, or public announcement of the change by the commission. Mr. Thomas, in an interview, supported this defacto policy by stating that: "Should a consent decree with goals and timetables come before the commission, it doesn't have the votes," Thomas said. "They simply don't get approved."[2]

Mr. Chairman, I consider the abandonment of the use of hiring goals and timetables by Mr. Thomas as giving up the most effective tool for combating more than 300 years of discrimination in this country against minorities and women. I see this action by Mr. Thomas as ill-advised and wrong, absent a judicial determination finding the use of goals and timetables illegal.

During his reappointment hearing before your committee Mr. Thomas said, in response to questions, that all EEOC attorneys will be told "that they are to seek goals and timetables and race- and sex-conscious remedies permissible under the ruling of the Supreme Court."[3] Mr. Thomas' past lukewarm commitment and oppositions to goals and timetables, suggest that his new understanding of the law may fade infavor of another position that he "...like[s]".

• Mr. Thomas has failed to implement "systemic" case processing at the EEOC. Systemic work is that which seeks to have an impact on large numbers of the protected classes at one time by initiating charges based on patterns and practices of exclusion. The EEOC has not undertaken enough of this work. It has had a low priority for Mr. Thomas. It is very cost-effective work because you can have an effect upon large numbers of people at one time.

In November, 1985, Mr. Thomas announced that the Commission filed three class action lawsuits against four larger employers for alleged race, sex and national origin disrimination under Title VII of the 1964 Civil Rights Act, as amended. The suits affect blacks, women, Hispanics and other monorities who allegedly were victims of company systems which discriminate against them.

Mr. Thomas said that: "These cases are examples of this commission's program to file strong court cases and to undertake a more vigorous litigation program through ... class action cases, " "You are just beginning to see the results of the tough new enforcement policy we adopted last year".

To date we have not heard any more about the U.S. district court cases: EEOC v. Citizens Bank and Trust Company of Maryland; EEOC v. Peterson, Howell and Heather, Inc. and its parent company PHH Group, Inc.; and in Chicago, EEOC v. Panduit Corporation.; and/or the additional cases filled by EEOC under Mr. Thomas' Chairmanship, do not reflect a "**... more vigorous litigation progaram through ... class action cases**". How many cases have been processed under this new aggressive enforcement program? The members of Subcommittee on Employment Opportunities have not received any communications on systemic case processing from the EEOC since November 12, 1985. I believe that this information is pertinent and important in evaluating Mr. Thomas' performance as Chairman of the EEOC.

Lack of a program indicates his lack of commitment to the vigorious enforcement of federal EEO laws. For example, on July 24, 1986, it was reported that Huguley v. G.M., which alleges that the interview system used by G.M. to grant raises and promotions to salaried employees discriminates against blacks.[4] A federal judge granted class-action certification in this case to about 14,00 black salaried employees in Michigan. Statistical data is necessary for the implementation of EEOC systemic case processing because some forms of discrimination are so subtle that they only become visible when you have the big picture. Huguley v. G.M., is an example of the type case the EEOC ought to be identifying in intake and pursuing in systemic case processing.

Chairman Hatch, these are some of the reasons, I strongly object to the reappointment of Clarence Thomas as Chairman of the Equal Employment Opportunity Commission.

Sincerely,

CHARLES A. HAYES
Member of Congress

CAH/df

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1 EEOC leader claims gains, but admits problems linger, by Isaiah J Poole, The Washington Times, Friday, February 28, 1986, p.12C

2 EEOC Drops Hiring Goals, Timetables, *Antibias Practice Ends Without A Vote*, by Howard Kurtz, Washington Post, Tuesday, February 11, 1986, A-1.

3 *Wygant v. Jackson Board of Education*, the ruling rejected the Justice Department's position that affirmative action benefit only proven victims of discrimination, and that goals therefore are not permissible. Justice Powell wrote wrote for himself and Justices Burger and Rehnquist:

> We...hold that, as a means of accomplishing purposes that otherwise may be legitmate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes -- such as the adoption of hiring goals -- are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Further, Justice Sandra Day O'Connor in a separate concurring opinion wrote:

> The court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.

4 See: *"Bias Lawsuit Against GM Given Class-Action Status"*, Wall Street Journal , p.2.

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SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

Mr. Chairman, I would like to thank you for allowing me to comment on the reconfirmation of Clarence Thomas as Chairman of the Equal Employment Opportunity Commission.

As Chairman of the House Subcommittee on Employment Opportunities which has oversight responsibility of the EEOC, I have grave concerns about the past record of Mr. Thomas as Chairman and reservations about extending Mr. Thomas' chairmanship for another four-year term.

My concerns are numerous and cover not only the agency's policy decisions but also its administrative and personnel practices.

First and foremost I am concerned about the performance of the EEOC as the leading civil rights agency enforcing employment discrimination laws. Contrary to the agency's public relations, the agency is literally drowning in their backlog of employment discrimination complaints both in the private and public sectors. The average amount of time it takes for discrimination victims to get their complaints resolved is absolutely shameful. While the agency has steadfastly sought to improve its management of caseload, it has undercut its own effectiveness by issuing new enforcement policies calling for increased litigation of individual complaints at the expense of accepting negotiated settlements between parties and in the agency's curtailing class action suits which resolve a greater number of complaints while stopping major patterns of discriminatory behavior.

The desire to resolve complaints has been undercut by arbitrary policies enacted by the EEOC which actually handcuff the ability of its attorneys and staff to undertake efficient policies to rid the agency of its complaints load. The EEOC's "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination", by requiring a pursuit of full relief for victims of discrimination result in fewer and fewer cases being settled while more and more cases crowd the litigation docket with further backlogs. In 1982 29.4 percent of case closure were due to settlements however, by 1985 that number had dropped to 14.4 percent. This policy apparently discourages conciliations instead of encouraging them as required under Title VII. Specifically, I am concerned about the EEOC's requirement

that employers post notices admitting to their "crimes". Committee staff were informed on their visits that many employers will incur the expense of a trial instead of posting this notice that they have discriminated. This is especially true in sex discrimination cases.

Chairman Thomas has made it clear to field staff that "numbers" of closures are of the utmost importance. Unfortunately, this greater emphasis on numbers has caused more rapid closures at the expense of adequate investigations. In fact, it has been discovered because of this unnecessary emphasis on numbers, district offices are padding their case numbers to get a "good" rating from the Commission.

The EEOC's "Statement of Enforcement Policy" issued in 1984 also seems to have had a negative impact on the work that the EEOC is doing. By requiring that all charges where "reasonable cause" is found go before the Commission, staff seem to be holding back in issuing a cause finding. Again, nothing makes this clearer than the numbers. In fiscal year 1985 more than 56.2 percent of all new charges were considered "no cause" as compared to 28.5 percent in 1980. This strigent policy requires investigators and attorneys to be almost absolutely positive that a case is clear cut and will stand-up in a court of law, thus eliminating those which would have a questionable impact or that may be lost on the merits.

My second major concern is over the administration of the EEOC. While claiming much more is being done with less money these days, this is not the case at the EEOC. As an illustration, this agency, once again in a series of years, has threatened to furlough thier 3000 employees due to a shortfall in funds, blamed on the Gramm-Rudman cuts. However, the agency's staff, particularly the management staff, has continued a series of traveling for both questionable and low priority purposes which undercut the seriousness the agency places on fiscal austerity.

In addition, not only is the Commission top heavy but its overemphasis on management is having a negative impact on the field and compliance staff. These complaints stem from a variety of reasons.

This emphasis on numbers of case resolutions, while expending great efforts to bringing unprecendented numbers of individual litigation cases has also caused the compliance staff to lose interest and respect in their jobs, thus lowering morale substantially.

Another administrative move which has lowered morale has been the 1984 downgrading of intake unit EOSs to GS 9, 7 and 5 levels. These intake EOSs are the first persons which the public encounters at the EEOc are and responsible for obtaining the initial information from the charging parties. Although the intake units' responsibilities require seasoned, knowledgeable

personnel, the effect of the downgrading has been to staff the units with persons with less experience and training to perform this essential function. The quality of the work product generated by the intake units has therefore, reportedly declined.

My final concern is over the great liberties this agency has taken with regard to legal precedents in enforcement policies. Attack has been made on the adverse impact theory of Title VII law and the use and legality of affirmative action tools such as goals and timetables. In addition, major regulations, such as the Uniform Guidelines on Employee Selection Procedures, are facing debilitating changes, although they have been affirmed legally and have been proven successful over a period of twenty years.

The debate on the use of statistical measures including goals and timetables continues to be a problem within the Commission. During oversight visits by staff in December of last year it was discovered that Acting General Counsel Johnny Butler had orally directed Attorneys to no longer recommend goals and timetables in any consent decrees. Although Mr. Thomas, before the subcommittee, stated that he was not responsible for this action, it is clearly the policy of Mr. Thomas to oppose goals and timetables. However, if Mr. Thomas was not responsible for this action, there is no reason he could not reverse it. More specifically in light of the three recent Supreme Court decisions, I would expect that the EEOC will strongly endorse and pursue the use of goals and timetables.

I also would like to point out that there has never been a Commission vote on this issue and that until such vote changes the EEOC's directives then Chairman Thomas is under obligation of the law to enforce these policies. Unfortunately, it has become blatantly obvious that he is not.

My strongest concern with this entire debate is the secretness that Chairman Thomas has decided to wrap himself in. Not only are the changes in policy being done orally so that no one has anything to refer back to in writing, he continually denied the change to Congress until the story was finally leaked in the press. This decision to lie to Congress is inconceivable and unexcusable. The position of a Chairman of any agency or organization is to make policy decisions which he believes will be beneficial but more importantly to do so in an open and honest manner. I have seen none of this openness in Clarence Thomas and after four years I don't optimistically expect a change.

Another oral directive which has not been put in writing is the Commission's misled belief that only identifiable victims of discrimination can be assisted. This policy virtually does away with class action cases. Prior to this shift, the EEOC would seek repef such as goals and timetables to correct an employer's discriminatory employment practices. This approach was used because it is almost impossible to identify "victims" through limited EEOC information and resources. Courts also view this identifiable victims policy as inadequate as recently verified by

the Supreme Court's decision in Local 28. The negative effect of this shift in policy is no where more evident than in the number of discrimination victims assisted. In the first half of 1985, only 2,964 victims of discrimination received monetary benefits through charges filed as compared to 15,328 persons receiving similar benefits in 1980.

Although Chairman Thomas has based much of this policy shift on the Justice Department's narrow interpretation of Firefighters Union Local 1784 v. Stotts, I want to take this opportunity to stress to Chairman Thomas that in light of the other Supreme Court decisions, this is not the intention of the Court at all and that EEOC policy should be reversed to adequately reflect the law of the land.

The final oral policy change which I would like to address is the EEOC's renunciation of the adverse impact theory to prove discrimination. This policy, which was enunciated by the U.S. Supreme Court in Griggs v. Duke Power, is embodied in the Commission's Uniform Guidelines on Employment Selection Procedures. The adverse impact theory says that employers' neutral hiring and promotion requirements are discriminatory unless they can be justified as job related. However, EEOC attorneys now must find other theories to prove discrimination wuch as disproportinate exclusion which they have not adequately define. The adverse impact theory has been important in combatting pervasive discrimination especially in class action cases.

In closing, if this esteemed Committee does reappoint Mr. Thomas to a second term, I hope that you will urge Chairman Thomas to seriously revamp many of the conflicting EEOC policies. More specifically, I would like to reiterate many of the recommendations that we made earlier this year in our Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission. These recommendations would adequately address the concerns that I have raised here today:

1) The Acting General Counsel should immediately rescind his oral directive to regional attorneys that they not refer propsed consent decrees which contain goals and timetables to headquarters for approval.

2) The Acting General Counsel should also exercise the responsibility accorded to him by Title VII of the Civil Rights Act of 1964 by enforcing existing consent decrees which contain goals and timetables especially in light of the Supreme Court's ruling that this remedy is appropriate and permissible.

3) The Commission should make clear to compliance staff as well as to the employer community and the general public that the EEOC will enforce the law as it exists and that it will continue to seek goals and timetables and other forms of prospective relief, where necessary, to remedy the effects of discrimination.

4) The Commission should conduct its policymaking openly and consistent with the requirements of the Administrative Procedure Act and the Sunshine Act.

5) The EEOC should rescind its apparent policy or practice of seeking remedies only for identified victims of discrimination and utlize all available remedies including prospective and formula relief where appropriate, insofar as such relief is permissible under court precedent.

6) The EEOC should make clear that the "reasonable cause" standard to determine whether the agency believes that a charging party has suffered discrimination, requires that quantum of evidence sufficient to state a prima facie case of discrimination, and to rebut, at least in part, a respondent's explanation for its actions. The standard does not require an amount of evidence sufficient to "win" a case if brought to trial.

7) The Commission should make clear to district office staff that whenever full relief is sought, they must pursue and seek to obtain all make-whole relief, including back pay and retroactive seniority.

8) The EEOC should continue to utilize the adverse impact theory to attact systemic discrimination in accordance with Griggs v. Duke Power and the Uniform Guidelines on Employee Selection Procedures.

9) The EEOC and the Office of Personnel Management (OPM) should restore the equal employment opportunity specialists (EOSs) in the intake units to a maximum level of GS-11 and the intake supervisors should be upgraded to GS-13 level. These changes would ensure that a charging party is provided adequate information during the intake process and would promote quality work in perfecting the case file, which is the basis for the administrative process of the charge.

10) The EEOC should issue a directive to district office staff stating that the charges in investigation at the EEOC, particularly those over 300 days old, should not be closed prematurely. Moreover, a comprehensive audit should be conducted with the intention of reopening cases which were investigated poorly.

11) The Commission should provide adequate travel funds for onsite investigations, in accordance with its emphasis on thorough and quality investigations.

12) The Commission should provide more formalized, on-going training opportunities for all EOSs in the intake units, as well as for investigators in the rapid and extended charge processing units, focusing on both discrimination law and investigative techniques.

13) The Commission should provide adequate staffing to the State and Local Program, as well as staff training in order to better and more closely monitor and evaluate the work of the Fair Employment Practices Agencies (FEPAs) and cases submitted for substantial weight reviews.

14) The Commission should make available to field offices additional full-time-equivalent (FTE) positions, to be reserved for investigative and legal units and for support staff in those units, in order to enhance the agency's enforcement activities. Whenever FTE slots become available from headequarters, through attrition, those FTE slots should be transferred to field offices.

15) The Commission should undertake immediate efforts to streamline both the expert witness procurement process and the administrative subpoena enforcement process, with a view toward eliminating inordinate delays and unnecessary layers of review.

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July 16, 1986

The Honorable
Orrin G. Hatch
United States Senate
Washington, DC

Dear Senator Hatch:

It is my understanding that the Committee on Labor and Human Resources will shortly hold hearings on the reappointment of Clarence Thomas as Chairman of the Equal Employment Opportunity Commission. I urge that Mr. Thomas be confirmed for this important position.

Because of my personal involvement in equal employment matters, and also that of other members of my firm, I have have had a unique opportunity to observe Mr. Thomas' handling of the responsibilities of chairman during his current term. The EEOC has been a controversial agency from the outset. The chairman's role is both difficult and demanding. Pressures from individuals and organizations under the jurisdiction of the agency are enormous and impossible to satisfy. Despite these challenges, I believe Mr. Thomas has done an excellent job.

In dealing with substantive matters which come before the Commission, he has consistently been willing to listen to all points of view. While I have not necessarily agreed with his positions on all issues, they are well reasoned and considered objectively.

He inherited serious administrative problems throughout the agency when he took office. From the outset he recognized the need to give priority to the resolution of these problems and has been effective in his efforts to do so.

Based on my observation of Mr. Thomas' performance in office, I respectfully suggest that he deserves reappointment.

Sincerely yours,

Kenneth C. McGuiness

Kenneth C. McGuiness

STATE BAR OF TEXAS

SECTION ON CONCERNS OF THE SPANISH SPEAKING
COMMUNITY OF TEXAS

July 18, 1986

The Honorable Orrin G. Hatch
United States Senate
135 Russell
Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

The purpose of this letter is to question the reconfirmation of Mr. Clarence C. Thomas as Chairman of the Equal Employment Opportunity Commission.

Several members of this State Bar Section have raised a number of questions regarding Mr. Thomas' qualification to continue in this most sensitive position. It has been mentioned on various occasions that Mr. Thomas has made numerous efforts to remove or force the retirement of Hispanics in high level positions with the Equal Employment Opportunity Commission and failed to give such group the opportunity advocated by the very purpose of the Commission.

We feel certain that a number of persons will appear before your Committee to challenge Mr. Thomas' reconfirmation and we join in challenging and opposing such reconfirmation.

Very truly yours,

Simon Y. Rodriguez
Chairman

vt

cc: Senator Lloyd Bentsen
Senator Phil Gramm

P. O. Box 26396, Austin, TX 78755

Senate Confirmation Hearing on the Nomination of Clarence Thomas to be Chair of the Equal Employment Commission

Joint Testimony of Civil Rights and Women's Rights Organizations

Dorothy Height*, Chair, John Jacob**, Vice Chair, M. Carl Holman***, Secretary-Treasurer of the Black Leadership Forum consisting of the heads of the 16 major civil rights organizations

and

The National Women's Law Center, the National Women's Political Caucus, the NOW Legal Defense and Education Fund, Women Employed and the Women's Legal Defense Fund

1986

* President, National Council of Negro Women
** President, National Urban League
*** President, National Urban Coalition

Senate Confirmation Hearing for Clarence Thomas
Joint Testimony of Civil Rights and
Women's Rights Organizations

We request as a personal courtesy to us and in light of the preeminence equal employment has for our organizations and constituencies that you include this statement in the confirmation hearing record of Clarence Thomas, who now serves as Chair of the Equal Employment Opportunity Commission. We are not aware of any rights organization that urges the reappointment of Mr. Thomas. Many oppose reappointment but given this administration's record have no illusions that a nominee committed to strong enforcement would replace the incumbent.

This Hobson's choice dilemma does nothing to quiet our concerns about the management and policy of the EEOC for the past five years. Moreover, the confirmation hearing of July 23, 1986, leaves open many of the most fundamental questions in the Commission's jurisdiction today, including the future of the Uniform Guidelines on Employee Selection, which prescribe an employer's basic obligations under the law, and the Commission's future use of the disparate impact theory of Griggs v. Duke Power, 401 U.S. 424 (1971). We take some comfort from the fact that the present Commission and Chair can do little to change the law on these two issues because of the mandate of U.S. Supreme Court rulings.

However, the record of the past five years provides no comfort whatsoever as to how these basic issues of law will be handled by the Commission or as to many other issues of equal concern to us. We detail only a few of the most serious.

1) Goals and Timetables

Without notice to the oversight committee or the public, the Commission secretly ceased using goals and timetables, a change of such magnitude, there can be no justification for such an unannounced shift.

Later, in testimony before the House Subcommittee on Equal Employment Opportunity, Mr. Thomas denied that he had ordered or authorized this change and allowed the acting general counsel, a civil servant, to take full responsibility. This explanation did nothing to inspire confidence or trust in Mr. Thomas or the other commissioners. Nor are we yet assured that the Commission will require goals and timetables in federal affirmative action plans, an obligation of special importance considering the government's role in mandating such equal employment requirements from others. Given the highly irregular and secretive manner in which this matter was handled by the Commission, we are unprepared to accept assurances concerning resumption of the use of goals and timetables given at the confirmation hearing unless the Committee monitors the agency in a more detailed fashion than it has done during the past several years.

2) Class Action Work

Similarly, we have been deeply concerned about the present Commission's return to an emphasis on individual cases while neglecting the formal systematic class action programs that were set up by the last administration when it got the backlog under control. (See GAO Appendix, pp. 5-6) The Commission has reverted to a "full relief" strategy geared to individual

complaints that long has been discredited in equal employment work. After years of criticism for failing to devote its efforts to major class action work that alone affects discrimination, the EEOC, with its backlog down, was able in 1979 to initiate two programs that concentrated exclusively on class matters. These programs have been effectively dismantled. The destruction of the class action program has enabled the Commission to avoid implementing goals and timetables and disparate impact, both of which would be necessary to any serious class action effort.

Class actions are important not only for the employers targeted but also for the voluntary compliance they engender among others to correct their own violations. Disquieting evidence that employers have relaxed their efforts is found in a 1984 report from a consultant to American businesses, Spencer Stuart and Associates, entitled "The Changing World of the CPO" (Chief Personnel Officer). CPOs were asked where they were spending "most of their time" in 1984 compared to "3 to 5 years ago," periods obviously designed to compare the effect of the policies of this administration with those of the prior one. Companies themselves reported EEO/Affirmative Action at the bottom of their concerns or number 13, compared with no. 6 in the years 1979-1981.

Mr. Thomas and the Commission bear a heavy share of the responsibility for retrenchment among employers in bringing themselves into compliance with the law. The many negative and ambivalent public statements and policies concerning affirmative action and equal employment law by Mr. Thomas and the present commissioners could not have gone unnoticed by employers.

3) Remedies for Victims of Discrimination

The "full relief" slogan also masks the opposite and felt effect of the Commission's policies on complainants throughout the country. Relief for complainants in 1985 returned to a low of 14.4 percent--virtually the same as it was more than ten years ago before the Commission's processes were reformed by the Commission under Chair Eleanor Holmes Norton. Despite a rise in the actual number of complainants filing at the EEOC, an extraordinary drop in the number receiving monetary relief occurred--2,964 complainants in the first half of 1985 compared to 15,328 in 1980. Further and ominously, EEOC's worst and most persistent problem, its backlog, is returning. The backlog of 130,000 cases inherited by the last administration was reduced by 92,000 or 71 percent in less than four years. By 1985 backlog growth was accelerating. The number of backlogged cases in 1982 was 33,417, but by 1985 it was 44,918.

More than any other problem, the backlog denies complainants their rights. It delays the processing of new cases until they are too old to be proved, and as cases accumulate they absorb most of the Commission's energy to the exclusion of critical strategies, such as class actions and litigation.

4) Litigation

Newspapers and official reports have documented how the litigation program of the Commission was destroyed, largely before Chair Thomas took office, by Michael Connolly who served as the Commission's first general counsel during the Reagan

administration. Mr. Connolly reduced sharply the number of cases submitted to the Commission for approval, and the Commission has never fully recovered. Mr. Thomas bears responsibility less for the initial problem than for the failure to mount effective strategies to address the production of appropriate litigation. However, he has attempted to blame the litigation decline on the Rapid Charge Processing System initiated by his precedessors. But RCP encouraged settlement only in small individual cases not suitable for litigation, and the Commission's case docket grew both in number and in quality of cases in 1980 and 1981 when RCP was in full use. (See GAO Appendix, pp. 3-4) The first year of decline in litigation was FY 1982, when this administration was fully in charge and had altered RCP and had reduced the approval of cases for litigation. There was an astounding 70 percent decline in cases filed in court in FY82.

The Commission filed 326 cases in 1980 and 368 in 1981 but only 164 in 1982, 136 in 1983 and 195 in 1984. As a result of strong criticism of this record, the Thomas Commission moved to a strategy of bringing litigation indiscriminately, claiming in a directive that "an enforcement philosophy . . . which attempts to determine which among several meritorious findings is worthy of governmental resources is inconsistent with our statutory obligations." This view is extraordinary for the way it misconceives the prosecutorial function of the government and its duty to apportion its scarce resources wisely and fairly, especially given the present budgetary constraints. As this Committee and virtually every other critic of the Commission has made clear

since its inception, the government's obligation is precisely to choose among the cases available to it those that will have the greatest impact on the public and on the elimination of discrimination. The Commission has failed to mount major litigation that might have resulted had it vigorously initiated class actions that have the largest impact. Instead it has hastily converted individual cases into litigation to achieve an increase in its reported caseload to 411 cases in 1985. Moreover, to inflate its litigation figures, it included 125 subpoena enforcement actions, the first time in its history the Commission has claimed mere demands for information as "litigation."

5) Commission Management

Comments made at the hearing commending EEOC management are seriously at variance with our experience and with the record, including a recent report by the House Education and Labor Committee. We also join the assessment of agency management reported in the detailed and careful 1986 study by Women Employed. That organization used EEOC data, but we note with alarm that Women Employed had to file under the Freedom of Information Act to obtain information that was routinely made available to the public on a regular basis during the last administration. The oversight responsibilities of this Committee will be severely undermined unless you require the Commission to both compile and periodically release data concerning its operations.

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Women Employed reported:

> By compiling and analyzing the agency's own performance statistics, we documented the steady improvements . . . occurred at the EEOC during the tenure of Eleanor Holmes Norton, and we have documented the rapid deterioration of the agency during the Reagan administration . . . The strong emphasis on fair settlements, rapid resolution of charges, and the commitment to strong enforcement that existed during the Carter administration has been replaced by inaction, incompetence and hostility toward victim's rights . . . Currently, over 56.2 percent of all new charges are determined "no-cause" by the EEOC compared with 28.5 percent of the cases filed four years ago . . . . Our research indicates that charges are being determined "no-cause" indiscriminately because of a lack of training on the part of the intake and investigative staff, a lack of resources to complete adequate investigations, and management's emphasis on closing files rather than quality intake and investigation.

A 1986 study by the House Education and Labor Committee similarly found serious management problems at the EEOC. An assessment finding substantial improvement in EEOC's management and in virtually all of its functions during the last administration was documented in an April 9, 1981 GAO report, the only full review of the agency's management since 1976. It found the "EEOC has made many significant improvements in its procedures and practices since 1976 that increase its ability to attack employment discrimination." (p. 5) We attach to this Statement the GAO's own summary of its findings.

If Clarence Thomas is confirmed for another term, a very heavy responsibility to closely monitor his performance will rest with the oversight committees. Today the Commission has serious policy, litigation, case processing, and other management problems. It has lost the confidence of the public and of the constituencies that look to it for protection. It needs strong prodding for vastly improved law enforcement and management not only from us but from this Committee.

Appendix
GAO Report, April 9, 1981
pages 6-7, 8-10

In 1976 we reported that some of [sic] interrelated factors, including many management problems limited EEOC's impact on employment discrimination. As a result of these problems, EEOC was unable to resolve individual charges in a timely manner, and most charges were closed administratively without any EEOC enforcement actions. Since our 1976 report, EEOC has made procedural and administrative changes that addressed many problems discussed in that report and improved its ability to deal with employment discrimination. A major contribution to EEOC's success in instituting these reforms was the stability in its top management positions.

Specifically, changes EEOC has instituted include:

-- Establishing an Office of Policy Implementation to centralize and systematize new equal employment opportunity policy through guidelines, interpretations, and rulings.

-- Establishing a field office structure that consolidated all authority and responsibility for charge resolutions in the district offices. EEOC eliminated its five regional litigation centers and seven regional offices and established a district and area office structure that provides broader geographic coverage and makes EEOC more accessible.

-- Expanding EEOC's relationship with State and local government fair employment practices agencies through contracts for resolving charges and enhancing the agencies' abilities to resolve charges. EEOC adopted a uniform funding formula for resolving charges, tying it to the agencies' performance to provide an incentive for them to increase charge resolutions.

-- Training EEOC personnel and State and local government fair employment practices agencies' staffs to administer the new charge processing system. EEOC officials said 4,000 persons have completed the training program.

-- Replacing the clerical staff with professional staff in the charge intake unit, which screens incoming complaints to eliminate those that are untimely and not within EEOC's jurisdiction.

-- Locating EEOC attorneys in district offices to work with equal opportunity specialists when investigating charges and developing a single standard of evidence for deciding whether cause exists on a charge and for litigation. This avoids additional investigation when charges cannot be settled informally and need to be litigated.

-- Establishing a separate charge processing system for resolving backlogged charges through negotiation, in which charging parties are contacted to identify active charges and settle them. EEOC reported that by using these procedures, the June 30, 1975, backlog of about

126,000 charges had been reduced about 56 percent, to about 55,000 charges, by September 30, 1979. EEOC planned to have the backlog cleared by the end of fiscal year 1982.

-- Establishing a management accountability system which includes plans for on-line computer support to give field managers the capability for constant program feedback on the status of the active workload and on the progress in meeting their program objectives.

Significant change in charge processing

Along with the foregoing, EEOC has made three additional changes in its charge processing procedures. These procedures, as discussed below, greatly enhance its potential effectiveness in enforcing title VII and concern the processing of individual charges and the development of systemic and class charges.

Rapid charge process

Perhaps EEOC's most important change since 1976 was the introduction of the "rapid charge process" to resolve new individual charges. (See ch. 3.) The rapid charge process heavily emphasizes the charging party and the respondent negotiating quick no-fault settlements of charges. Although not a party to this negotiation, EEOC acts as moderator/advisor. If the charge cannot be resolved in the rapid charge process, EEOC may send the charge to its extended processing unit for additional investigation and conciliation, as was formerly done with most charges.

EEOC tested the rapid charge process in its three model offices from September 26, 1977, to January 26, 1979, and implemented it in all 22 district offices on January 29, 1979. EEOC's success at getting settlements through the rapid charge process was demonstrated during the first 8 months that the process was in use in all the offices. EEOC data showed that through September 30, 1979, of the 8,819 charges closed from January 29, 1979, about 50 percent were negotiated settlements.

EEOC also reported that the resolutions took an average of 44 days from the date the charge was filed to the date it was resolved. In addition, we found no unmanageable accumulation of new unresolved charges that were older than 180 days, as we did during our earlier review [before the term of the Norton Commission]. However, the inventory of unresolved charges over 180 days old was increasing in the Baltimore and Dallas district offices and could, without better management, become unmanageable.

Comparable data are not available for the EEOC settlements before January 29, 1979, under the old processing procedures. However, we reported in 1976 that EEOC achieved settlements in about 11 percent of the charges resolved between July 1, 1972, and March 31, 1975, and that resolutions took an average of about 2 years to achieve. Also, EEOC officials stated that under the rapid charge process the average monetary benefit per settlement has increased to about $3,400 from the $1,400 under the old procedures, or an increase of about 150 percent.

Systemic program

Another important change was EEOC's designation of a separate unit in each district office to develop and investigate systemic charges. EEOC also established criteria for these units to use in selecting employers to investigate and procedures for processing systemic charges.

EEOC previously based its systemic work primarily on expanding individual charges filed with it; however, its systemic investigations are now primarily self-initiated, based on EEOC's analyses of data on employers' work forces. To initiate a systemic charge, EEOC district offices must demonstrate that the charge meets at least one of several targeting criteria. These criteria, in essence, require district offices to demonstrate that the employer:

--Has low representation of minorities and women in its employment (1) based on their availability in the labor force or (2) as compared to other employers in the same labor market who employ persons with the same general level of skills.

--Employs minorities and women primarily in lower paying jobs.

--Uses employment policies and practices, not justified by business necessity, that adversely affect minorities and women in hiring, assignment, promotion, etc.

To facilitate implementation of the program by its field offices, EEOC is focusing on worst cases first, that is, cases that have the greatest potential for succers, and on local and regional employers. Field offices are to target employers with 500 to 2,500 employees, while headquarters targets employers with over 2,500 employees. As of September 1979, EEOC had 45 systemic

charges under investigation that were developed under its new procedures.

Early Litigation Identification Program

To fill the gap in coverage between the rapid charge processing of individual charges, which are usually narrow in scope, and systemic charges, which cover broader issues, EEOC instituted a program to expand individual charges that have a potential impact for a class of persons, such as pregnant women. For some charges, a remedy for the charging party on an individual charge would not provide a remedy for other similarly situated individuals or preclude them from being subjected to the same discrimination, unless EEOC expanded the charge and settlement to include them.

This Early Litigation Identification program was instituted in April 1979. Although charges selected for expansion are processed in the district office extended processing unit instead of in the rapid charge unit, EEOC attempts to settle or conciliate these charges the same way as an individual charge.

As of September 30, 1979, EEOC had identified 693 charges under this program, of which 636 charges were still active.

Charge status	Number	
Charges identified		693
Disposition of charges:		
Dropped from program	5	
Withdrawn:		
With settlement	5	
Without settlement	2	
Settled or conciliated	42	
Charging party given right tolhsue notice	3	57
Charges on hand--September 30, 1979		636

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH THE AFL-CIO
KENNETH T. BLAYLOCK, NATIONAL PRESIDENT
JOHN N. STURDIVANT, EXECUTIVE VICE PRESIDENT
NICHOLAS J. NOLAN, NATIONAL SEC.-TREAS.
80 F STREET, N.W., WASHINGTON, D.C. 20001
Telephone: (202) 737-8700

IN REPLY PLEASE REFER TO

4/EEOC
July 25, 1986

JUL 28 1986

Orrin Hatch
Russell Senate Office Building
Room 135
Washington, D.C., 20515

Re: Nomination of Clarence Thomas

Dear Senator Hatch:

We are writing to state our firm opposition to the renomination of Clarence Thomas as Chairman of Equal Employment Opportunity Commission. Based on Chairman Thomas' July 15, 1986 letter to Congressman Augustus Hawkins and his testimony before your Committee on July 23, 1986, we are convinced that he lacks the leadership and experience necessary to continue to lead the Equal Employment Opportunity Commission.

We are attaching hereto our letter requesting to testify which outlines our grave concerns over Mr. Thomas' failure to enforce the 1964 Civil Rights Act.

We have have extensive experience with him over the past four years as the representative of federal workers specifically employees of the Equal Employment Opportunity Commission. During this time Chairman Thomas has refused and failed to play any positive role in enforcement of Equal Employment Opportunity in the federal government. Federal workers are now enmeshed in an administrative morass for processing discrimination complaints. An illustration of this morass is attachment two. This letter was sent to us on a case which we had appealed because the agency rejected a decision in our favor by the EEOC hearing examiner. As you can see, the Commission is asking us if we wish to continue pursuing our appeal. We had appealed and filed a brief in this case prior to receipt of this letter. It is insulting our intelligience and violating the law to tell us they will drop our appeal unless we respond to a specious letter which they have drafted. This is only one incident of our experiences with EEOC under Chairman Thomas.

We urge you to vote against his renomination on July 30, 1986.

Very truly yours,

Barbara B. Hutchinson

Barbara B. Hutchinson, Director
Women's Department

Attachments

4/EEOC

July 24, 1986

Honorable Orrin Hatch
Chairman
Senate Labor and Human
Resources Committee
United State Senate
Washington, D. C. 20501

Re: Nomination of Clarence Thomas,
Chairman, EEOC

Dear Senator Hatch:

In reference to the above, we represent over 700,000 federal employees, including the employees of the EEOC. We are requesting the opportunity to testify before your committee in opposition to the renomination of Clarence Thomas as Chairman of the EEOC. Mr. Thomas during his tenure as chairman has failed and refused to enforce the 1964 Civil Rights laws in regard to federal workers and private sector workers.

Chairman Thomas has clearly indicated that he does not wish to enforce the 1964 Civil Rights Act. His testimony before your Committee on July 23, 1986 shows that he, although an attorney, lacks the legal experience to lead this agency. His response as to the legality of one government agency suing another in the area of enforcement of affirmative action within the federal government are baseless. The Federal Labor Relations law provides exactly the right to sue another federal agency. Our members at EEOC have since Chairman Thomas was appointed had a drastic rise in the number of unfair labor practice charges.

Further, Chairman Thomas' response to Congressman Hawkins in the attached July 15, 1986 letter and his testimony on relations with the Justice Department show that he has no intentions of pursuing full and effective remedies for persons affected by discrimination. In his testimony before your Committee he stated that he will uphold the law yet in the July 15, 1986 letter, he clearly states that he will find it necessary to further study these cases.

ATTACHMENT 1

Chairman Thomas' position in regard to the Justice Department is without precedent in the history of the Commission. No prior Chairperson has ever conceded that the Justice Department could reverse the legal position the government has taken in courts below. Even the Supreme Court found it necessary to rebuke the Solicitor of the United States for reversing the Commission position in the Local 28 et Al v. E.E.O.C. 128 Daily Labor Report E-1. Justice Brennan at p. E-15 states:

> "Finally, petitioners and the Solicitor General find support for their reading of Section 706(g) in several of our decisions applying that provision. Petitioners refer to several cases for the limited proposition that court-ordered remedies under 706(g) are limited to make-whole relief benefiting actual victims of past discrimination... (citations omitted) This reliance is misguided."

Yet, Chairman Thomas testified before your Committee that although he will uphold the law his authority to represent the Government stops at the door of the Justice Department.

We object to a Chairman who states that although head of a law enforcement agency he is not able to see to its successful and complete enforcement. No agency head has ever come before the U. S. Senate or House of Representatives and delivered such a statement. The head of an executive agency is responsible not just to monitor the law but see to its implementation. We oppose Chairman Thomas' renomination and request that you permit us the opportunity to place our views on the record.

Sincerely,

Kenneth T. Blaylock
National President

Barbara B. Hutchinson
Director, Women's Department

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF REVIEW AND APPEALS
2401 E Street, N.W.
Washington, D.C. 20507

APR 21 1986

Mr. Bruce J. Stevens
c/o AFGE
P.O. Box 13129
Fort Carson, CO 80913

APR 24 1986

FAIR PRACTICES

Docket No. 01.84.2513
Agency No. Army

Dear Mr. Stevens:

It is anticipated that your appeal will be assigned for review within the next 90 days. The purpose of this letter is to ascertain your current interest in pursuing your appeal to avoid the issuance of a decision on matters no longer of interest or controversy to the parties.

A form is enclosed for you to use to indicate your intentions regarding your appeal. If you wish to continue with your appeal, please supply all information requested in the attached material and return it to us within 30 days. A postage-paid envelope is enclosed for your convenience.

Your case will not be assigned until we have heard from you. If you fail to respond, your case will be dismissed. Your cooperation in this matter is essential.

Sincerely,

P. E. Mann
for Dolores L. Kozzi, Director
Office of Review and Appeals

Enclosure

cc: Mr. Roderick C. Rodriquez
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

ATTACHMENT 2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

July 28, 1986

Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20501

Dear Senator Metzenbaum:

Thank you for the opportunity to respond to your concerns. Enclosed are my responses to the questions submitted.

Please let me know if there is any other information you would like me to provide.

Sincerely,

Clarence Thomas
Chairman

Enclosures

1. In the disclosure form which you submitted to this Committee, you state that you cannot recall the names of candidates or the amounts you contributed during the past 5 years. Having gone through the confirmation process once already, weren't you already aware of the requirement to list these financial contributions? Will you please reconstruct your records for the Committee?

   Answer: I have reviewed my records. And, as I indicated at the hearing, I have not made any contributions to political candidates which I have recorded. Nor do I recall making any. In my original answer, I was cautious because I may have made very small cash contributions to political campaigns, while attending receptions or fundraisers, even though I don't remember doing so. As a general rule, however, I do not make such contributions because I simply can't afford it.

2. Jeffrey Zuckerman was your chief of staff for almost two years. His testimony before this committee revealed a frightening disregard for well-settled legal positions in many areas of EEOC activity. You have described as "pernicious rumor-mongering" (any suggestion that Zuckerman has imposed his views upon you.) I therefore want to give you a chance to set the record straight by defining your own position on these subjects:

   Zuckerman maintained that eligibility for retirement may serve as a "reasonable factor other than age" defense under the Age Discrimination in Employment Act (ADEA). That position is contrary to longstanding EEOC practice, and has been rejected by three courts of appeals. What are your views on the eligibility for retirment defense? Will the Commission continue to prosecute such cases?

   Answer: In my view the question of whether eligibility for retirement can constitute a reasonable factor other than age defense under the ADEA lends itself to no easy answer. To the extent that eligibility for retirement is determined in part by reference to age (the common practice but by no means a necessary one), use of retirement eligibility is obviously age-linked. On the other hand, since eligibility for retirement is never exclusively a function of age, such that two individuals of the same exact age may (and frequently do) differ in their retirement eligibility, it is equally apparent that using retirement eligibility as a criterion is not a use of "age" in the normal sense of the term.

Thus, while retirement eligibility is usually explicitly age-linked, it is also arguably a factor other than age. Where not explicitly age-linked, such as if retirement eligibility were based on length of service alone, eligibility for retirement would not even be age-linked, and use of it could only constitute an ADEA violation if disparate impact analysis is appropriate under the ADEA. This is one situation where retirement eligibility could be a reasonable factor other than age.

Where retirement eligibility is age-linked in the retirement plan, I believe cases have to be evaluated individually to determine whether retirement eligibility is properly considered to be discrimination based on age. There are cases where to consider retirement eligibility to be equivalent to the use of age per se results in intuitively wrong results, and where one should feel comfortable in treating retirement eligibility as a reasonable factor other than age. Suppose a company faced with business reverses determines in a nondiscriminatory manner than a particular department must be reduced by two thirds, including elimination of two out of three manager positions. The retirement plan provides both that individuals must work ten years before becoming vested in the pension plan and that individuals are eligible for retirement after age 55 with 30 years of service. Retirement is mandatory at age 70.

One manager is age 58 and has 37 years of service, another is 69 and has 47 years of service; and the other is 67 with seven years of service. As between the first manager and the third, choosing to layoff the first manager because he is retirement eligible while the third manager is not results in retention of the significantly older employee not yet eligible for a pension. As between the second manager and the third, choosing to layoff the second manager rather than the third because of the second's eligibility for retirement would result in the retention of the slightly younger employee, who would then be unable to ever receive a pension from the employer, despite investing seven years of work towards that end and despite the fact the second manager would have to retire in a year anyway. Overall use of the criterion in this case results in the layoff of the much younger employee and the slightly older employee, hardly the pattern one expects from the use of age per se.

What this example illustrates to me is the inappropriateness of assuming that the use of retirement eligibility should be treated as tantamount to a use of age in all cases. There are a variety of situations where an across-the-board equation of retirement eligibility can result in what I regard as absurd results, and I am not prepared to interpret the ADEA as mandating those results. Although I am certain the Commission will continue to prosecute cases on the theory that eligibility for retirement constitutes a violation of the ADEA, this decision is not entirely within my control, since my vote is but one of five. I will continue to evaluate each case that comes before us on an individual basis, and as in the past will support litigation of those cases where I believe the intent and purposes of the ADEA would be furthered.

3. Zuckerman maintained that disparate impact theory is not applicable under the ADEA. Once again, every court to consider the issue has rejected the Zuckerman position. What are your views on the disparate impact theory under the ADEA? Will the EEOC prosecute cases brought solely (or primarily) under this theory?

Answer: First, I would like to point out that there are very few courts that have considered this issue, and their opinions on the issue are not particularly detailed or persuasive. I have appended to my answers several law review articles that address the issue in great detail and conclude that the disparate impact theory should not be applied under the ADEA. I would also emphasize that the relative paucity of the caselaw on this subject confirms my experience at the EEOC that disparate impact cases arise very infrequently under the ADEA. The attention paid to this issue in Mr. Zuckerman's hearing is grossly disproportionate to the frequency with which these cases occur.

That said, the starting point for understanding my own view is the statute, specifically its statement of findings and purpose. There, we find the repeated use of the word "arbitrary," in the phrases "the setting of arbitrary age limits," and "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age," and finally in the sentence "It is therefore the purpose of this Act ... to prohibit arbitary age discrimination in employment...." Thus, whatever the scope of the prohibitions that follow in the Act, those prohibitions have to be understood in light of the Act's distinction between arbitrary and nonarbitrary uses of age or other criteria.

A second key to my view is my awareness that the ADEA is patterned on Title VII in many respects, creating in my mind a certain presumption of parallelism where similar language is used and of non-parallelism where different language appears. Thus, section 4(a)(2) of the ADEA uses the same language making it unlawful for an employer "to... classify his employees in any way which would... tend to deprive any individual of employment opportunities" that the Supreme Court relied on in Griggs to find that Title VII reaches unintentional disrimination under the disparate impact theory. Section 4(f)(1), however, contains the caveat that it is not unlawful to take action where a differentiation (i.e., classification) "is based on reasonable factors other than age." Since disparate impact theory only applies where a factor other than age is used, it is clear to me at least that any use of disparate impact analysis is limited by the ADEA's exemption for "reasonable" factors other than age. This comports with my understanding of the word" arbitrary," which I view in this context as meaning the opposite of "reasonable." In sum, then, to the extent that disparate impact theory applies, it applies only to the use of arbitrary and unreasonable factors other than age. There is no similar limitation in Title VII.

In response to the second part of your question, whether the EEOC will prosecute cases brought solely (or primarily) under this theory, I can only say that it depends both on whether we get such cases and the views of my fellow Commissioners as well as my own. As a theoretical matter, I can see myself voting to litigate such cases where appropriate; as a practical matter, I do not anticipate that situation arising very often.

4. Zuckerman maintained that the Equal Pay Act does not cover the situation where a female makes less than her male predecessor or male successor in the same job. The Zuckerman view conflicts with decisions by 8 courts of Appeal and with the EEOC's longstanding approach. Do you believe the Equal Pay Act covers these situations on "nonconcurrent employment"? Will the EEOC prosecute such cases?

Answer: I have in the past, and expect to continue to do so in the future, supported litigation under the EPA where "nonconcurrent employment" is involved, so obviously I believe the EPA covers such situations. Moreover, the Commission itself recently reaffirmed that position in the EPA interpretations that it approved for transmittal to OMB and which will be published shortly. Therefore, I presume that the Commission will continue to authorize litigation of such cases.

5A. Finally, Zuckerman maintained that the Equal Pay Act allows an employer to pay men and women unequally for the same work so long as they are not working in the same physical location. This position has been supported by some courts and rejected by others. Do you believe that physically separate work places may constitute a single "establishment" under the Equal Pay Act if there is a significant relationship between the work of the employees in the various locations (e.g., teachers in different schools within same system; salespeople in different branches of same store)? Will the EEOC prosecute such cases?

Question: In my view, in certain circumstances physically separate work places can constitute a single establishment under the EPA. While the general rule is that the term "establishement" in the EPA is limited to one physical location, # the caselaw and the Commissions' proposed EPA inerpretations, which I support, recognize that in special circumstances portions of an operation at several distinct locations can be treated as a single establishment. The recent approval by the Commission of these interpretations indicates that the Commission as a whole also supports that view and thus is likely to authorize litigation in appropriate cases.

5b.(If not), given that Title VII, enacted after the Equal Pay Act, does not apply to employers with fewer than 15 employees, is it your view that Congress intended to leave 15 million employees of small business entirely unprotected against wage-based sex discrimination?

Answer: Not applicable.

6. Two weeks ago, four members of this Committee sent you a letter requesting information on the serious charges of sex and age discrimination brought against Trans World Airlines in connection with the labor dispute between TWA and the Independent Federation of Flight Attendants. Do you have any information for us at this time? When will you have the information we requested?

Answer: See attached.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

JUL 28 1986

Honorable Paul Simon
United States Senate
Washington, D. C. 20510

Dear Senator Simon:

Thank you for your letter of July 24, 1986. I appreciate the opportunity to respond to the additional questions submitted by you. Attached are my responses to those questions.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

AFFIRMATIVE ACTION

QUESTION #1: Could you provide the Committee with your own interpretation of the Court's decision in these cases?

ANSWER: The Supreme Court has issued three decisions addressing the use of goals and timetables in remedying discrimination: Wygant v. Jackson Board of Education, Local 28 v. EEOC and Local 93 v. City of Cleveland. The net effect of these three decisions is to clarify that numerical goals and other race-conscious techniques are legally available to aid in seeking relief in pattern and practice discrimination cases, and that such relief need not be limited so as to benefit only identified victims of discrimination. The Court emphasized, however, that these race conscious remedies are not to be ordered routinely, but rather must be reserved for those unusual cases of pervasive and egregious discrimination where they are truly necessary to achieve the objectives of Title VII. A majority of the Justices appear to believe that goals are used most appropriately in pattern and practice cases when they serve as a "benchmark" to measure whether an employer is now complying with Title VII and the specific injunctive relief ordered by the court.

As I made clear in my testimony before Congress in March 1986, and before the Labor and Human Resources Committee on July 23, 1986, I have every intention of following Supreme Court case law on this matter. The Commission, of course, will have to study these complex cases further to determine exactly when and how goals may be used under Title VII. I would like to emphasize, however, that goals are only one possible technique to use in seeking relief from discrimination and that the Commission has been devoting considerable energy in developing many effective approaches for curing and correcting employment practices which violate Title VII.

Also enclosed is a copy of the July 25, 1986, memorandum to the Commission's District Office Directors and Regional Attorneys from the Acting General Counsel and the Director of Program Operations regarding the use of goals and timetables.

AFFIRMATIVE ACTION

QUESTION #2: Do you agree that no "change at all" is required in the enforcement of Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, etc. by the EEOC in view of the Supreme Court's recent decisions?

ANSWER: Yes, I agree that no "change at all" is required in the enforcement of the three statutes in question by the EEOC in view of the Supreme Court's recent decisions, except to the extent that we must now, through the General Counsel, direct the agency's attorneys that goals and timetables are available as a part of the remedy in certain cases.

QUESTION #3: Do you regard the Court's decision as a clear rejection of the Administration's philosophy that only victims of discrimination can benefit from affirmative action?

ANSWER: I regard the Court's decision as holding that "goals and timetables" is a permissible remedy under Title VII of the 1964 Civil Rights Act.

QUESTION #4: Based on your reading of the Court's decision, under what circumstances should the EEOC seek affirmative action goals and timetables as a remedy following litigation or as part of a consent decree?

ANSWER: EEOC currently includes a variety of affirmative action relief as a part of the remedy following litigation, in consent decrees, and conciliation agreements. These remedies essentially require specific changes in the employers' practices, such as specific changes in recruitment, hiring and promotion policies. When these remedies, among others, appear to be unlikely to effectively eliminate a pattern and practice of egregious or pervasive discrimination, race and sex conscious remedies such as goals and timetables may be considered.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

JUL 25 1986

MEMORANDUM

TO : All District Directors
and Regional Attorneys

FROM : Johnny J. Butler
General Counsel (Acting)

James H. Troy
Director
Office of Program Operations

SUBJECT : Guidance on Remedies

The United States Supreme Court, in three recent decisions* clarified the status of law respecting the permissibility of the use of the remedy of "goals and timetables". The standards set in these decisions will provide the parameters for the use of goals and timetables.

You should continue to adhere to the requirements of the Commission's "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination." That is ". . .a full remedy must be sought. . .," in all cases.

It has been and still is the policy of the EEOC to enforce all previously executed conciliation agreements, settlement agreements and consent decrees.

---

*/ Wygant v. Jackson Board of Education, No. 84-1340 (S.Ct., decided May 19, 1986); Local 28 of the Sheet Metal Workers' International Association v. EEOC, No. 84-1656 (S.Ct., decided July 2, 1986); and Local No. 93, International Association of Firefighters v. City of Cleveland, No. 84-1999 (S.Ct., decided July 2, 1986).

cc: Richard Komer, Office of Legal Counsel
Dolly Rozzi, Office of Review and Appeals
Phyllis Berry, Office of Congressional Affairs
Deborah Graham, Office of Communications

EFFECTIVE EEOC ENFORCEMENT

QUESTION #1: Since your original confirmation as Commission Chairman, what can you point to specifically as your major accomplishments in improving the the plight of victims of racial, national origin, age, religious or sex discrimination?

ANSWER: Enclosed are copies of the FY84 and FY85 Commission accomplishment reports.

QUESTION #2: Do you have a goal -- some things you would like to see accomplished during your next term, if confirmed?

ANSWER: As I stated in my July 23, 1986 testimony before the Labor and Human Resources Committee:

> "The initial efforts to develop the capacity to implement our policies have been very positive. But so much remains to be done. Tough, but fair, enforcement must become the hallmark of EEOC or it has absolutely no reason to exist. The Commissioners have successfully garnered and focused the positive energies of the agency toward such enforcement. But we still must enhance our ability to properly characterize cases at the earliest possible stage of our administrative process; we must improve on the quality and timeliness of our investigations; we must enhance the credibility and quality of litigation efforts; we must continue to develop a systemic program that focuses on discernible patterns and practices of discrimination and effectively eliminate them from the workplace; we must continue in our efforts to automate EEOC and build centralized data systems with integrity; and perhaps most important, we must continue to upgrade our personnel and our resources.
>
> This "must do" list is a major reason for my seeking to remain as Chairman of EEOC."

EFFECTIVE EEOC ENFORCEMENT

QUESTIONS #3 and #4: Discrimination complaints involving Federal employees appear to experience substantial delays from the time that they are filed until a hearing by a complaints examiner (if necessary) is held. Delays from the time the hearing is held until a decision is made are sometimes even longer. If "justice delayed is justice denied," what can be done to speed up the processing of Federal employee discrimination complaints?

Does EEOC have a sufficient number of investigators/complaints examiners to investigate and hear these cases? If additional resources are needed, what are they?

ANSWER: I am enclosing testimony given on June 17, 1986 before the House Subcommittee on Employment and Housing. It is a comprehensive statement about the Commission's Federal sector responsibilities and recent actions in that area.

The Commission can monitor the length of time an agency takes to process complaints, however, we have no control over the internal functions of another agency.

The time for completion of a hearing process varies throughout the country since some Commission District Office Hearing Units have manageable caseloads. Other District Offices, where there is a larger concentration of federal employees and more complaints, have higher caseloads, such as the Baltimore-Washington corridor. And, therefore, the processing time starting from when a request for a hearing is made until the issuance of a recommended decision, is considerably longer.

Delays in issuing decisions after the hearing and upon receipt of the transcript also occur most often in those offices where there is an extensive caselond. EEOC has increased personnel allocations to offices with larger caseloads and i ntroduced new program initiatives such as "decisions from the bench" to help solve caseload problems at the hearing stage.

EFFECTIVE EEOC ENFORCEMENT

QUESTIONS #3 and #4 (continued):

ANSWER (continued): We believe the only way the caseload can be reduced is by the hiring of additional Attorney-Examiners in those offices where the caseload is large and where the continuing high number of receipts prevent that particular office from reducing its caseload.

We have provided you with two charts which show the workload and workflow based on level staffing with increased rates of productivity that shows a continuing rise in the caseload. The second chart provides for enhanced staffing with the same rate of closures. Only through increased staffing will the caseload be reduced to six months of work, which we consider the optimum caseload to provide the quality of work we desire.

EFFECTIVE EEOC ENFORCEMENT

In addition, Senator Simon asked the following question on behalf of Senator Kennedy:

QUESTION: "Mr. Thomas, in reply to a question from Senator Kennedy you said that the reports from the Education and Labor Committee that EEOC has renounced the adverse impact test were false. Will you submit to the Senate Labor Committee any and all documents and records regarding use of the adverse impact test?

ANSWER: Neither I nor the Acting General Counsel gave any such orders to EEOC attorneys. No such documents or records exist.

FY 1988 OMB Budget Submission
Public Sector Programs (OPO)
Workload and Workflow
ENHANCED STAFFING

Workload and Workflow	FY 1986 Estimate	FY 1987 Estimate	FY 1988 Estimate
Total Complaints Pending	4503	3313	2983
Total Complaints Received	5686	5970	6270
Total Workload	9991	9283	9253
Total Complaints Closed	6678	6300	6300
Total Complaints Forwarded	3313	2983	2953
Months of Inventory	6.0	5.7	5.6
Total Productive Positions	106	100	100
Average Closures Per Productive Pos.	63	63	63

FY 1988 OMB Budget Submission
Public Sector Programs (OPO)
Workload and Workflow
ASSUME LEVEL STAFFING

Workload and Workflow	FY 1986 Estimate	FY 1987 Estimate	FY 1988 Estimate
Total Complaints Pending	4305	5109	6074
Total Complaints Received	5686	5970	6270
Total Workload	9991	11079	12344
Total Complaints Closed	4882	5005	5390
Total Complaints Forwarded	5109	6074	6954
Months of Inventory	12.6	14.5	15.5
Total Productive Positions	77	77	77
Average Closures Per Productive Pos.	63	65	70

Senator WALLOP. I thank you for your patience, and I salute you for your job. I very much appreciate the fact that you are willing to offer another 4 years of your life in this thankless world.

Mr. THOMAS. Thank you.

Senator WALLOP. But I think what you have been doing is a service to the country. I for one very much appreciate that.

Mr. THOMAS. Thank you, Senator.

Senator WALLOP. The committee stands adjourned.

[Whereupon, at 11:15 a.m., the committee was adjourned.]

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63-495 (136)